82-556

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No. ..-....

IN THE

Supreme Court of the United States

October Term, 1982

PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

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Questions Presented.

The PRESS-ENTERPRISE COMPANY respectfully petitions that a Writ of Certiorari issue to review the Order of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, entered in this proceeding on May 13, 1982.

1. Is the exclusion of the public from the *voir dire* proceedings in capital cases in direct violation of the public's rights guaranteed under the United States Constitution First Amendment as interpreted by this Court in *Richmond Newspapers Inc. v. Virginia*, (1980) 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814?

2. Has the application of the California Supreme Court decision of *Hovey v. Superior Court*, (1980) 28 Cal.3d 1; 168 Cal.Rptr. 128; 616 P.2d 1301, deprived the public of the right to attend criminal trials as guaranteed by the First Amendment of the United States Constitution extended through the Fourteenth Amendment to the citizens of every state?

3. Has the application of the California Supreme Court decision of *Hovey v. Superior Court*, (1980) 28 Cal.3d 1; 168 Cal.Rptr. 128; 616 P.2d 1301, and its application by the lower courts deprived the public of the right to attend criminal trials as guaranteed by the due process clause of the Fourteenth Amendment of the United States Constitution?[1]

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[1]The parties to this action are: PRESS-ENTERPRISE COMPANY, SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE.

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Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

Orders Below.

The Order of the Court of Appeal of the State of California was not reported, and appears in the Appendix hereto (see Appendix, page 1). The Order of the Supreme Court of the State of California denying hearing is not reported.

Jurisdiction.

The Order of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was entered on May 13, 1982. The Order of the Supreme Court of the State of California denying Petitioner's Petition for Hearing was entered on June 30, 1982. Under 28 U.S.C. Section 1257(3), this Court's jurisdiction is invoked.

Constitutional Provisions Involved.

United States Constitution, Amendment 1:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peacefully assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment 6:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment 14, Section 1:

> ". . . nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

At issue in this case is a conflict between the public's First Amendment right to have access to criminal trials and the Defendant's Sixth Amendment right to a fair trial. Spe-

cifically, Petitioner was denied its right to attend and observe the *voir dire* proceedings and further was denied access to the transcripts of these proceedings. This issue was brought before the Court last term in another California capital case, in which the trial court closed the entire *voir dire* proceedings. The petition to this Court was denied.[1]

The record before the lower court was through a verified petition of counsel containing the following pertinent facts:

1. Petitioner, PRESS-ENTERPRISE COMPANY, is a California corporation, and publishes two newspapers of general circulation, THE MORNING PRESS-ENTERPRISE and THE EVENING PRESS-ENTERPRISE, from its principal offices located in Riverside, California.

2. There was a criminal action before Respondent Court, entitled *People of the State of California v. Albert Greenwood Brown, Jr.*, Riverside Superior Court Case No. CR 1804. The action involved a complaint filed by the Riverside County District Attorney's Office seeking the imposition of the death penalty against the Defendant, arising out of the murder and rape in connection with the death of a teenage girl.

3. On October 19, 1981, prior to the commencement of jury selection, an oral and written motion was made by Petitioner to allow the public access to the *voir dire* examination of prospective jurors. After argument, however, the court, through the Honorable J. William Mortland, Judge Presiding, denied Petitioner's motion to keep the *voir dire* examination open to the public.

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[1]The petition was in *Press-Enterprise Company v. Superior Court of California, County of San Diego*, Case No. 811022, the trial court closed the entire *voir dire* proceedings and the appellate court ordered the transcripts to be released at the end of the jury selection. Although the petition was denied, Justices O'Connor, Marshall and Brennan voted to hear the case.

4. On December 30, 1981, after the empanelment of the jury but before the calling of the first witness, Petitioner again made an oral and written motion directed to Respondent Court, requesting that a complete transcript of the *voir dire* proceedings be released to the public.

5. In oral argument on that date, counsel for both Defendant BROWN and the People of the State of California, argued that there was some type of implied agreement between the court and the jurors assuring the latter of the permanent confidentiality of the *voir dire* examination.

6. Respondent Court denied Petitioner's motion and stated in its December 30, 1981 ruling:

> "The right of privacy should prevail and the right to a fair trial should prevail and the right of the people to know, I think, should have limitations and, so, at this stage, the motion to open up anything that has been ordered sealed, including, again, the individual sequestered voir dire proceeding is denied without prejudice."

7. On or about February 23, 1982, after ALBERT BROWN had been convicted and sentenced to death, Petitioner made an oral and written *ex parte* application for release of the transcripts of the *voir dire* proceedings before Respondent Court.

8. Respondent Court, after considering application of the Petitioner for release of the transcripts of the *voir dire* proceedings, denied the application.

9. After Respondent Court's ruling, this Petitioner sought relief in the Court of Appeal, Fourth Appellate District, Division Two, through a petition for writ of mandate to compel the Respondent Court to vacate its Order and release the transcripts to the public, and order that Respondent Court vacate its Order denying Petitioner's request to be present during the *voir dire* proceedings.

10. The Appellate Court, through the Honorable J. Douglas McDaniel, Acting Presiding Justice, summarily denied Petitioner's request, without articulation.

11. Immediately following the Court of Appeal Order, Petitioner sought a hearing with the Supreme Court of the State of California. On June 30, 1982, the Supreme Court of the State of California denied Petitioner's request for a hearing.[2]

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[2]The Order entered by the California Supreme Court on June 30, 1982, indicated that Chief Justice Rose Bird, the author of the original opinion, requested that the matter be given a hearing.

REASONS FOR GRANTING THE WRIT.

I.

The Public Has a Constitutional Right to Attend Criminal Trials.

The First Amendment of the United States Constitution provides for the right of free speech and right of free press.

This Court, in *Richmond Newspapers, Inc. v. Virginia,* (1980) 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814, interpreted this important right as it related to criminal trials:

> "We hold the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, the important aspects of freedom of speech and 'the press could be eviscerated'."

The above, coupled with another of this Court's decisions, *Gannett Company, Inc. v. DePasquale,* (1979) 443 U.S. 368; 61 L.Ed.2d 608; 99 S.Ct. 2898, has established that there is an independent public interest in the Sixth Amendment guarantee of a public trial, which is protected implicitly by the First Amendment.

Therefore, it is clear that the public has a constitutional right to attend criminal trials.

II.

The Voir Dire Proceeding Is an Integral Portion of the Trial Process.

The *voir dire* examination of prospective jurors has been considered a public and integral part of the complete trial process (as cited in the opinion of Justice Blackman in *Gannett Company, Inc. v. DePasquale,* (1979) 443 U.S. 368; 61 L.Ed.2d 608; 432 N. 12; 99 S.Ct. 2898; and the Arkansas case of *Commercial Printing Company v. Lee,* (1977) 262 Ark. 87; 553 S.W.2d 270.

California case law states that the jury selection is an integral part of a "public trial". In the case of *People v. Teitelbaum*, (1958) 163 Cal.App.2d 184; 329 P.2d 157, the court stated:

> "The trial of the action, so far as the term 'public trial' is concerned, consists of the proceedings for *the impanelment of the jury* and the opening statements of counsel, the presentation of evidence, the arguments, the instructions to the jury and return of the verdict . . ." (Emphasis added)
>
> *People v. Teitelbaum*, 163 Cal.App.2d at 206, 207; 329 P.2d 172.

During the *voir dire* examination the trier of fact is selected. A trial obviously cannot be called a "public" trial when this important function is done in private. The judicial process would be subject to suspicion and doubts cast on its ability to function as the disciplinary arm of society if the trier of fact is chosen in secret.

In recognizing the importance of an open and public trial, this Court, in its recent *Richmond Newspapers* case, quoted J. Bentham, Rationale of Judicial Evidence, 524 (1827):

> "Without publicity, all other checks are insufficient: in comparison of publicity, all of other checks are of small count. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance." 448 U.S. at 569; 65 L.Ed.2d at 985; 100 S.Ct. 2824.

In the instant case, the lower court not only closed the *voir dire* proceedings to the public, but thereafter sealed the transcripts permanently. Thus, an integral portion of the trial process was conducted entirely in secret. Allowing the trier of fact to be selected behind closed doors not only

violates Petitioner's constitutional rights, but also endangers the entire judicial process by casting suspicion and doubt on its ability to function as a disciplinary arm of society.

III.

The California Supreme Court *Hovey* Decision as Applied by the Lower Courts Has Deprived the Public of Its Constitutional Right to Attend Criminal Trials.

This Court's decision in *Richmond Newspapers, Inc. v. Virginia*, (1980) 448 U.S. 555; 65 L.Ed.2d 973; 100 S.Ct. 2814, held that the right to attend criminal trials is implicit in the guarantees of the First Amendment.

In *Near v. The State of Minnesota*, (1931) 283 U.S. 697; 75 L.Ed. 1357; 51 S.Ct. 625, this Court reaffirmed that the liberties guaranteed under the First Amendment were protected under the Fourteenth Amendment as follows:

> "It is no longer open to doubt that the liberty of the press and of speech is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by the state action."
>
> *Near v. The State of Minnesota*, 283 U.S. at 707; 75 L.Ed. at 1363; 51 S.Ct. at 628.

It has also been held that the judicial branch of the state is also subject to the same limitations of the due process clause of the Fourteenth Amendment as the executive and legislative branches of the states. *Bouie v. City of Columbia*, (1964) 378 U.S. 347, 353-354; 12 L.Ed.2d 894; 84 S.Ct. 1697.

In balancing the various public and private interests involved, the freedoms of the First Amendment (as incorporated by the Fourteenth) must be given a preferred position. *Marsh v. Alabama*, (1946) 326 U.S. 501, 90 L.Ed.

265, 66 S.Ct. 276; *New York Times v. United States*, (1971) 403 U.S. 713; 29 L.Ed.2d 822; 91 S.Ct. 2140.

This Court, in *Richmond Newspapers*, held as follows:

> "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."
>
> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 581; 65 L.Ed.2d at 992; 100 S.Ct. at 2830.

The California Supreme Court decision in *Hovey v. Superior Court*, (1980) 28 Cal.3d 1; 168 Cal.Rptr. 128; 616 P.2d 1301 and its application by the lower courts in the instant action have deprived Petitioner and the public in general of their common law and constitutional rights to attend criminal trials. In doing so, California courts have failed to show an overriding interest which necessitates or justifies interference with these First Amendment rights.

Chief Justice Rose Bird of the California Supreme Court ruled as follows in *Hovey*:

> "In order to minimize potentially prejudicial effects identified by the Haney study, this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done *individually and in sequestration*." (Emphasis added)
>
> *Hovey v. Superior Court*, 28 Cal.3d 80; 168 Cal.Rptr. at 181; 616 P.2d at p. 1354.

It should be noted that the basis for the *Hovey* decision is not a study involving the potential influences or bias of the public on prospective jurors. The Haney study referred to a single survey which polled only 67 persons who had viewed a simulated video-taped *voir dire* proceeding. The conclusion was reached that prospective jurors were influ-

enced by the amount of time spent on death-qualifying *voir dire* proceedings, as well as the obvious effect of fellow prospective jurors being disqualified because they could not believe in the death penalty as an appropriate punishment. There is no mention in the Haney study of any influence the presence of the public might have during the *voir dire* proceedings, nor does the *Hovey* decision say explicitly that there is any.

Moreover, the decision in the *Hovey* case also provides as follows:

> "This rule will not in any way affect the open nature of the trial. Although trial counsel and the court may pose general questions to the panel, venire persons shall not respond to any questions beyond those routinely asked in any criminal trial until they are *outside the presence of their fellow venire persons*." (Emphasis added)
>
> *Hovey v. Superior Court*, 28 Cal.3d 80-81; 168 Cal.Rptr. at 181; 616 P.2d at 1354.

While it is clear that the rights of the accused must be protected in capital cases, the protections afforded, especially to the exclusion of the constitutional rights of others, must have a firm and reasonable basis. The complete opinion of *Hovey* lacks that basis for the exclusion of the public during the *voir dire* proceedings.

IV.

The *Hovey* Decision Is an Unconstitutional Prior Restraint on the Exercise of First Amendment Rights.

As previously cited, the California Supreme Court pursuant to "its supervisory authority over California criminal procedure," mandated that the *voir dire* proceedings on death-qualifying issues be done individually and in seques-

tration. *Hovey v. Superior Court*, (1980) 28 Cal.3d 80; 168 Cal.Rptr. 128; 616 P.2d 1301.

It has long been recognized that the First Amendment guarantees of speech and press necessarily include the right to receive information. This Court, in *Richmond Newspapers* stated as follows:

> "The explicit guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."
>
> *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 576, 577; 65 L.Ed.2d p. 989; 100 S.Ct. p. 282.

In the instant case, the mandate contained in the *Hovey* decision amounts to a prior restraint on the exercise of Petitioner's First Amendment rights. Not only was Petitioner denied its right to attend criminal trials to hear, see and communicate observations concerning the *voir dire* proceeding, but further was denied access to the transcripts of these proceedings. It is clear that by denying the press an ability to seek out the news, the freedom of the press has been eroded.

Further, by keeping these proceedings beyond the public eye, the *Hovey* decision and the lower court in this instant action have effectively restrained the exercise of the public's First Amendment right to free speech.

This Court, in *Nebraska Press Association, et al. v. Hugh Stewart*, (1976) 427 U.S. 539; 49 L.Ed.2d 683; 96 S.Ct. 2791, stated:

> "The First Amendment provides that 'Congress shall make no law . . . abridging the freedom . . . of the press,' and it is 'no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.' *Near v.*

> *Minnesota ex rel. Olson*, 283 U.S. 697, 707; 75 L.Ed. 1357; 51 S.Ct. 625 (1931). . . . The court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary — orders that impose a 'previous' or 'prior' restraint on speech. None of our decided cases on prior restraint involve restrictive orders entered to protect a defendant's right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case."
>
> *Nebraska Press Association v. Hugh Stewart*, 427 U.S. at 556; 49 L.Ed.2d at 695-696; 96 S.Ct. at 2801.

This Court concluded that the theme in all of the cases dealing with these rights was the dissatisfaction with prior restraints:

> "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.
>
> "A prior restraint, by contrast and by definition has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time."
>
> *Nebraska Press Association v. Hugh Stewart*, 427 U.S. at 559; 49 L.Ed.2d at 697-698; 96 S.Ct. at 2803.

It is clear that a prior restraint on the exercise of the freedom of speech or freedom of press is presumed to be unconstitutional. Prior restraints will not stand unless it is shown that there are no less stringent alternatives available. *Nebraska Press Association v. Hugh Stewart*, 427 U.S. at 563-564; 49 L.Ed.2d at 700; 96 S.Ct. at 2805.

A complete examination of the *Hovey* decision reveals that there is no discussion of possible alternatives less restrictive on the public's right to attend a trial. Less stringent alternatives such as those offered in the *Nebraska Press Association* case were not considered.[3]

The *Hovey* decision, through its application and expansion by the lower courts, has established a prior restraint to access and reporting of the *voir dire* proceedings in capital cases. In doing so, the California Supreme Court and the lower courts have failed to rebut the presumption that such a prior restraint is unconstitutional.

V.

The Mandate in *Hovey* Is Unconstitutionally Vague and Overbroad.

It is a well settled principle of law that statutes must be narrowly drawn to afford citizens a sufficiently definite warning as to the proscribed conduct when measured by the common understanding of men of common intelligence, *Jordan v. DeGeorge*, (1951) 341 U.S. 223; 95 L.Ed. 886; 71 S.Ct. at 703.

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[3]Alternatives suggested in *Nebraska Press Association*, 427 U.S. 539, were: (1) change of venue; (2) postponement of the trial to allow public attention to subside; (3) questioning prospective jurors to screen those with fixed opinion as to guilt or innocence; (4) the use of emphatic and clear instructions on the sworn duty of each juror to decide only on evidence presented in open court; (5) sequestration of jurors, *Nebraska Press Association v. Hugh Stewart*, 427 U.S. at 563, 564; 49 L.Ed.2d at 700; 96 S.Ct. at 2805.

In the instant case, the California Supreme Court has failed to adequately define the term "sequestration" as it refers to Petitioner's important First Amendment rights.

The mandate of the California Supreme Court in *Hovey*, closing the *voir dire* proceedings on death-qualifying issues, is subject to the same scrutiny as legislative enactments. This Court stated in *NAACP v. Button*, (1963) 371 U.S. 415; 9 L.Ed.2d 405; 83 S.Ct. 328:

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application."
>
> *NAACP v. Button*, 371 U.S. at p. 433; 9 L.Ed.2d at p. 418; 83 S.Ct. at p. 338.

While the *Hovey* decision does not expressly state that members of the public in general and members of the press in particular shall be excluded during the jury selection proceedings, certain lower courts in so construing the mandate of the California Supreme Court have prohibited the public and the press from attending the *voir dire* proceedings.

It must be remembered that the rationale of the *Hovey* decision was that prospective jurors were influenced by the amount of time spent on death-qualifying *voir dire* proceedings and were affected by observing fellow prospective jurors being disqualified because of their moral opposition to the death penalty as an appropriate punishment. There is no mention in the *Hovey* decision of any influence the public may or may not have on the venire persons during this part of the *voir dire* proceedings.

The California Supreme Court, by not carefully defining the procedure lower courts are to utilize in complying with this mandate, has impliedly authorized lower courts to exclude the public.

It is respectfully submitted to this Court that a mandate from any judicial body should be reviewed on an even higher standard than that regularly applied to statutes. This is especially true when constitutional rights are at issue. A rule of law created by the judicial branch is without the input that citizens ordinarily have through the legislative process. Attendance at a judicial proceeding, including the appellate process, is usually limited to the parties involved.

When a decision of the judicial branch is unclear and has failed to state specifically what type of conduct is prohibited, then such a mandate is unconstitutionally overbroad.

VI.

The Lower Courts, Without Statutory or Case Authority, Have Wrongfully Sealed the Transcripts of the Jury Selection.

The lower court's original order sealing the transcript, and subsequently the tacit approval accorded by the Court of Appeal and the California Supreme Court, have clearly violated Petitioner's constitutional rights.

Reviewing a transcript of a proceeding is at best a poor substitute for actual observation at the hearing. However, it at least allows some information to be dispersed to the public. As stated earlier, the ability to gather information is essential to the full exercise of freedom of the press and vital to its societal functions.

Although California's statutory and case law set certain limitations on *voir dire* examination, none of the limitations exclude the public's access to the jury selection process, either by way of physical exclusion or by sealing of the

transcripts. Sealing the transcript was clearly unauthorized, and nothing in *Hovey* can be found to justify it in the instant case.

Nor can the lower court's order be justified by the fact that both counsel for the defense and for the State opposed release of the transcripts. As this Court made clear in *Gannett Co., Inc. v. DePasquale*, (1979) 443 U.S. 368; 61 L.Ed.2d 608; 99 S.Ct. 2898, while the Sixth Amendment guarantees the accused the right to a public trial, it does not offer the right to a private trial. Further, inherent in any agreement of the parties to an action to deny Petitioner its constitutional right to attend trials is the risk of a veil being placed over what has traditionally been a public forum.

VII.

The *Hovey* Decision Has Not Received Uniform Application in the State of California.

Since February 22, 1982, the date our previous petition was denied, California trial courts have continued to apply the *Hovey* mandate, but have failed to implement the same procedure in all capital cases. In Riverside County, California, a relatively small jurisdiction where the instant case originated, the *Hovey* mandate has, in just the last year, received at least six (6) different interpretations, largely because of the State Supreme Court's failure to define sequestration in that decision.

In some cases, such as the instant case, judges have not only denied petitioners access to the entire *voir dire* proceeding, but have also permanently sealed the transcript of these proceedings. In other cases, part of all of the *voir dire* process was closed to the public, but transcripts were made available. In still other cases, the court closed the *voir dire* process to the public, but allowed press representatives to attend. Finally, some trial court judges have interpreted the

Hovey mandate more liberally to require that jurors be questioned individually during the death-qualifying phase outside the presence of other venire persons, and therefore have left the jury selection process open to the press and public.

The problem resulting from the *Hovey* mandate is not confined to one county. An informal survey conducted by counsel for Petitioner shows that in Orange County and Los Angeles County, the death-qualifying phase in each capital case is automatically closed to the public and the press.

It is clear that the absence of direction and clarity in the *Hovey* decision threatens Petitioner and the public's First Amendment rights in all capital cases. Further, the lack of uniform application of the *Hovey* mandate throughout the State of California is further evidence that exclusion of public and press during the *voir dire* process is unwarranted.

Conclusion.

The issue of a court's ability to close the *voir dire* proceeding to the public and the press has been presented to this Court previously. Allowing the *Hovey* decision to stand without review by any court has in effect authorized trial courts to infringe on the public and Petitioner's constitutional rights as guaranteed by the First Amendment, without justification.

Restraint on the exercise of these First Amendment rights has not been shown to be necessary to further any compelling interest. Nor have the California courts shown that less stringent alternatives are not available. Further, the lower court's action in this instant case, expanding the *Hovey* decision to include sealing the transcripts, creates a dangerous precedent and incalculable risk for future closures of not only *voir dire* proceedings, but other parts of the criminal trial, and by no means limited to capital cases.

As this Court recognized in its *Richmond Newspapers* decision, the public's right to attend a criminal trial is not only an essential ingredient in the First Amendment guarantees of freedom of speech and freedom of press, but also is vital to our concept of an open and democratic society.

Imposition of a death penalty is undoubtedly a continuing controversial issue. In order to obtain a full discussion by the public on this issue, it is essential the public has access to all of the information available relating to the death penalty and its imposition. This information necessarily includes the specifics of the jury selection in any particular capital offense case.

Petitioner is hopeful that review by this Court will clarify the rights of the public to attend criminal trials, specifically the *voir dire* proceeding, not only in capital cases, but all cases in which sensitive areas of *voir dire* examination may arise.

Therefore, it is respectfully prayed that this Court grant a writ of certiorari, reverse the decisions below, and grant a hearing to consider the rights of the public to attend and observe the trial process.

Respectfully submitted,

THOMPSON & COLEGATE,
By JAMES D. WARD,
Attorneys for Petitioner,
Press-Enterprise Company.

APPENDIX.

Court of Appeal, State of California, Fourth Appellate District, Division Two.

Press-Enterprise Company, Petitioner, vs. Superior Court, Riverside County, Respondent, 4 Civil No. 27904, County No. Cr. 18104.

Filed: May 13, 1982.

THE COURT: The petition for writ of mandate is DENIED.

McDaniel, *J.*
Acting Presiding Justice

CC:

County Clerk, Riverside County, 4050 Main St., Riverside 92501

Thompson & Colegate, J. D. Ward, J. A. Boyd, P.O. Box 1299, Riverside 92502

Dist. Atty., Riverside County, R. Spitzer, Dep., Drawer 1148, Riverside 92501

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Joseph P. Myers, 4048 10th St., Riverside 92501

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Press Enterprise Co., 3512 14th St., Riverside 92501

Gray, Cary, Ames & Frye, 2100 Union Bank Bldg., S.D. 92101.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

June 30, 1982

I have this day filed Order

HEARING DENIED.

In re: 4 Civil No. 27904, PRESS-ENTERPRISE CO. *vs.* SUPERIOR COURT, RIVERSIDE.

Respectfully,
Clerk

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Office-Supreme Court, U.S.
FILED
APR 12 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California Corporation,

Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,

Respondent.

On Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

JOINT APPENDIX.

JAMES D. WARD,
JOHN A. BOYD,
THOMPSON & COLEGATE,
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(714) 682-5550,
Counsel for Petitioner.

GERALD J. GEERLINGS,
County Counsel,
GLENN ROBERT SALTER,
Deputy County Counsel,
JOYCE ELLEN MANULIS REIKES,
Deputy County Counsel,
3535 Tenth Street, Suite 300,
Riverside, Calif. 92501,
(714) 787-2421,
Counsel for Respondent.

PETITION FOR CERTIORARI FILED SEPTEMBER 27, 1982.
CERTIORARI GRANTED JANUARY 24, 1983.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

JOINT APPENDIX

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FIRST DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-19-81 5. NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*. Thompson & Colegate by: James D. Ward.

REPORTER: William Beam.

PROCEEDING: First Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 32 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using one Court Reporters — running a daily transcript).

People represented as indicated and defendant present with counsel.

The PRESS ENTERPRISE, represented by Thompson and Colegate present a written MOTION RE: GENERAL PUBLIC SHOULD BE ADMITTED TO ALL PHASES of the jury voir dire. The motion is ordered filed, counsel argue the motion. The motion is denied and granted in part, as stated on the record.

The following motions by the defense, are received and ordered filed, counsel argue same:

MOTION RE: DISCOVERY DATA — Both counsel having reached an agreement, stated — SO ORDERED;

MOTION IN LIMINE TO EXCLUDE PHOTOGRAPHS' pursuant to 402 of the Evidence Code — DENIED, without prejudice;

MOTION TO PREVENT TRIAL ON ISSUES pursuant to 190.2(2)P.C. — DENIED, without prejudice;

MOTION RE: JURY SELECTION — FOR INCREASE IN NUMBER OF PEREMPTORY CHALLENGES — DENIED, reasons stated;

MOTION TO RESCUE THE DISTRICT ATTORNEY, and CHANGE OF VENUE — DENIED, without prejudice.

Jury venire having been summoned, are sworn to answer questions touching upon their qualifications as prospective jurors.

The Court reads the AMENDED INFORMATION to the prospective jurors.

The defendant has waived being present on this date, only — and is excused.

Counsel continue their jury voir dire.

The prospective jury is admonished and excused until 1:30 P.M., on 10-20-81 to which time trial of this matter is adjourned.

MORTLAND, Judge
Wight, Clerk

2nd DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood, Jr., DATE & DEPT. 10-20-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*.

REPORTER: William Beam.

PROCEEDING: 2nd Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using one Court Reporters — running a daily transcript).

People represented as indicated and defendant present with counsel.

Counsel resume jury voir dire.

Second panel of prospective jurors having been summoned, are sworn to answer questions touching upon their qualifications.

The Court reads the Amended Information.

Counsel continue with voir dire.

The prospective jurors are admonished and excused until 10-21-81 at 10:00 A.M., this department.

OUTSIDE THE HEARING OF THE PROSPECTIVE JURY:

The defendants admitts the priors, having withdrawn his denial.

The Court advised him of his rights, same waived and the admission is ordered entered.

Trial is adjourned until 10-21-81 at 9:30 A.M.

MORTLAND, Judge

Wight, Clerk

3rd DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-21-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*.

REPORTER: William Beam and Dorothy Dawson.

PROCEEDING: 3rd Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using two Court Reporters — running a daily transcript).

People represented as indicated and defendant present with counsel.

All members of the jury voir dire are present and seated in the Court room.

The Court re-reads the Amended Information, and Caljic #2.90, list of the proposed witnesses.

OUTSIDE THE HEARING OF THE PROSPECTIVE JURY:

> The defendant admitts priors, the Court advises the defendant of the possible term to be served as to each prior.
>
> The admission is ordered entered.

AGAIN IN THE PRESENCE OF THE PROSPECTIVE JURY: Counsel resumes jury voir dire.

The jurors are admonished and excused until 10-22-81 at 10:00 A.M., this department.

MORTLAND, Judge
Wight, Clerk

4th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-22-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*.

REPORTER: William Beam and Dorothy Dawson.

PROCEEDING: 4th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

The prospective jurors are present and seated in the court room.

Counsel resumes jury voir dire.

The jury is admonished and excused until 10-26-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

5th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-26-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*.

REPORTER: William Beam and Dorothy Dawson.

PROCEEDING: 5th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

All prospective jurors are present and seated in the court room.

Counsel resumes jury voir dire.

All members of the prospective jury are admonished and excused until so ordered to return by telephone call by this Court and counsel to commence individual voir dire on 10-27-81 at 9:30 A.M.

OUTSIDE THE HEARING OF THE PROSPECTIVE JURY:

Court and counsel take up: Defense counsel's oral Motion In Limine Re: Photographs #1-a thru #1-34 of the victim and crime scene.

Counsel argue the motion.

IT IS ORDERED THAT: The Photographs marked Peoples' Exhibits #1-14, 1-15, 1-24 and 1-31 may be used to show the prospective jurors during their voir dire.

Trial of this matter is adjourned until 10-27-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

6th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-27-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson.

PROCEEDING: 6th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY).

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Prospective jurors are present as required, and counsel resume jury selection.

Trial of this matter adjourned until 10-28-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

7th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-28-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 7th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

Trial of this matter is adjourned until 9:30 A.M., 10-29-81, this department.

MORTLAND, Judge
Wight, Clerk

8th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 10-29-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson.

PROCEEDING: 8th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II). PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as above and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

Trial of this matter is adjourned until 11-2-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

9th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-2-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*.

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 9th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated above and defendant present with counsel.

Counsel continue with jury voir dire.

Trial of this matter is adjourned until 11-3-81 at 9:30 A.M., this department.

Each juror was admonished as excused.

MORTLAND, Judge
Wight, Clerk

10th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-3-81 5, NUMBER: CR-18104.

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 10th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated above and defendant present with counsel.

Counsel continues with individual voir dire.

Trial of this matter is adjourned until 11-4-81 at 10:00 A.M., department 5.

Each juror was admonished as excused.

MORTLAND, Judge
Wight, Clerk

11th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-4-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 11th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel continues with individual voir dire.

Trial of this matter is adjourned until 11-9-81 at 9:30 A.M., this department.

Each juror was admonished as excused.

MORTLAND, Judge
Wight, Clerk

12th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-9-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Barbara Krajec and Dorothy Dawson

PROCEEDING: 12th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel continues with individual voir dire.

The jurors, have each been admonished as they were excused.

Trial of this matter is adjourned until 11-10-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

13th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-10-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Barbara Krajec and Dorothy Dawson

PROCEEDING: 13th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel continues with individual voir dire.

Each juror is admonished as excused.

Trial of this matter is adjourned until 11-12-81 at 9:00 A.M., department 5.

MORTLAND, Judge
Wight, Clerk

14th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-12-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Barbara Krajec and Dorothy Dawson

PROCEEDING: 14th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

[redacted]RIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant [redacted]us: CUSTODY)

([redacted]TED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel continue with voir dire of the individual jurors.

Each juror admonished as excused.

Trial of this matter is adjourned until 11-16-81 at 9:30 A.M., department 5.

MORTLAND, Judge
Wight, Clerk

15th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-16-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 15th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume with jury voir dire of each juror, individually.

Each juror is admonished as they are excused.

Trial of this matter is adjourned until 11-17-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

16th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-17-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 16th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume with their individual voir dire.

Each juror is admonished and excused until further notice.

Trial of this matter is adjourned until 11-18-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

17th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-18-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 17th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused to remain on call.

Trial of this matter is adjourned until 11-19-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

18th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-19-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 18th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused to remain on call.

Trial of this matter is adjourned until 11-23-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

19th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-23-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Tricia Avery and Dorothy Dawson

PROCEEDING: 19th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused.

The Court having summoned an additional jury venire, same are sworn to answer questions touching upon their qualifications.

The Court reads the AMENDED INFORMATION and the Caljic Instruction # 2.90.

The prospective jurors are admonished and excused to remain on call to be contacted by telephone during the individual voir dire.

Trial of this matter is adjourned until 11-24-81 at 9:30 A.M., this department

MORTLAND, Judge
Wight, Clerk

20th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-24-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: W. Beam and D. Dawson

PROCEEDING: 20th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant is present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused to remain on call.

Trial of this matter is adjourned until 11-25-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

21st DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-25-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: W. Beam and D. Dawson

PROCEEDING: 21st Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant is present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused to remain on call.

Trial of this matter is adjourned until 11-30-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

22nd DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 11-30-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Tricia Avery

PROCEEDING: 22nd Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

The jurors are admonished as they are excused to remain on call.

Trial of this matter is adjourned until 12-1-81 at 1:30 P.M., this department.

MORTLAND, Judge
Wight, Clerk

23rd DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-1-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Tricia Avery

PROCEEDING: 23rd Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

Trial of this matter is adjourned until 12-2-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

24th DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-2-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 24th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume voir dire of each juror, individually.

People and defendant accept the jury.

*Court announces all jurors will be notified.

Court and counsel will resume with voir dire re: alternates.

Trial of this matter is adjourned until 12-3-81 at 9:30 A.M., this department.

MORTLAND, Judge
Wight, Clerk

25th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-3-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 25th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as represented as indicated and defendant present with counsel.

Jury selection is resumed. Both sides accept the jury.

Trial adjourned until 12-7-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

26th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-7-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Dorothy Dawson and Tricia Avery

PROCEEDING: 26th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resumes jury selection.

Court is adjourned until 12-8-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

27th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-8-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Dorothy Dawson and Tricia Avery

PROCEEDING: 27th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resumes jury selection.

The original daily transcript is ordered sealed.

Court is adjourned until 12-9-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

28th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT: 12-9-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Dorothy Dawson and Tricia Avery

PROCEEDING: 28th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resumes jury selection.

Court is adjourned until 12-10-81, at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

29th DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-10-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: Dorothy Dawson and Tricia Avery

PROCEEDING: 29th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resumes jury selection.

Court is adjourned until 12-14-81, at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

30th DAY JURY TRIAL —
— VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-14-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 30th Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

counsel resumes jury selection.

Court is adjourned until 12-15-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

31st DAY JURY TRIAL — VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-15-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*

REPORTER: William Beam and Dorothy Dawson

PROCEEDING: 31st Day Jury Trial — Violation of Sections & Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel.

Counsel resume with jury selection.

People and defense accept the jury and the alternates as indicated.

The Court orders that the jurors be summoned and sworn as trial jurors on 1-4-82 at 9:30 A.M.

Trial is adjourned until 12-30-81 at 9:30 A.M., both counsel having orally waived time for notice of hearing of Motions for that date.

All remaining prospective jurors to be notified to report to the jury assembly room for further instructions.

Trial adjourned until 12-30-81 at 9:30 A.M.

MORTLAND, Judge
Wight, Clerk

32nd DAY JURY TRIAL —
VIOLATION OF SECTIONS & CHARGES.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert Greenwood Brown, Jr., DATE & DEPT. 12-30-81 5, NUMBER: CR-18104

COUNSEL: District Attorney by Robert *Spitzer*, Deputy Joseph Peter *Myers*. Thompson & Colegate by: James D. Ward, (Press)

REPORTER: W. Beam and T. Avery

PROCEEDING: 32nd Day Jury Trial — Violation of Sections and Charges: 187PC (190.2(a)(17) Sub (iii)) P.C. (Count I). 261 Sub 2 & 3 P.C. (12022.8PC) (Count II).

PRIORS: 261 Sub 3 P.C., 261 Sub 3 P.C. (Defendant Status: CUSTODY)

(NOTED: Using two Court Reporters — running a daily transcript)

People represented as indicated and defendant present with counsel. OURSIDE THE HEARING OF THE JURY: Counsel for the PRESS-ENTERPRISE COMPANY present and moves to file MOTION FOR RELEASE OF TRANSCRIPT OF VOIR DIRE PROCEEDINGS & COURT ORDERS RE PRELIMINARY EVIDENTIARY MOTIONS OF ALBERT GREENWOOD BROWN — same ordered filed.

Motion argued and denied without prejudice.

Letter from Joseph Peter Myers dated 12-16-81 ordered filed, copy of same to be provided to counsel for the PRESS-ENTERPRISE.

Defendants' MOTION IN LIMINE TO LIMIT THE SCOPE OF EXAMINATION WITNESSES-Defendants'

MOTION TO EXCLUDE EVIDENCE (402 hearings) are received, and ordered filed, argued by counsel and DENIED with the exception of the portion (A Beagle Motion) that is GRANTED.

The motion to allow press coverage during the trial — submitted.

Trial of this matter is adjourned until 1-4-82 at 9:30 A.M.

SUBSEQUENTLY THE COURT SIGNS THE FORM: As Follows:

CONSENT FOR EXTENDED MEDIA COVERAGE

I hereby give my consent for the media recording or broadcasting of trial court proceedings in this criminal case by the use of still cameras, provingin the operation thereof is quiet and unobtrusive.

Signed: J. WILLIAM MORTLAND, Judge of the Superior Court County of Riverside.

(/) Copies to D.A. & J. Myers

MORTLAND, Judge
Wight, Clerk

MINUTE ORDER DENYING EX-PARTE APPLICATION TO RELEASE TRANSCRIPT OF THE VOIR DIRE PROCEEDINGS.

Superior Court of the State of California, County of Riverside.

TITLE: People vs. Albert G. Brown, Jr., DATE & DEPT. 2-23-82 5, NUMBER: CR-18104

COUNSEL: District Atty: R. Spitzer, J.P. Myers, Thompson & Colegate for Press Enterprise Co. by: J. *Ward*

REPORTER: NONE

PROCEEDING: Minute Order denying Ex-Parte Application to Release Transcript of the Voir Dire Proceedings

The Ex Parte application of the Press Enterprise Company to release the transcript of the Voir Dire proceedings is denied, Application ordered filed.

The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion.

MORTLAND, Judge
Wight (sf), Clerk

Original Information of District Attorney.

In the Superior Court of the State of California, in and for the County of Riverside.

The People of the State of California, Plaintiff, v. Albert Greenwood Brown, Jr., Defendant(s). No. CR. 18104.

Arraign: 1-19-81.

Filed: December 31, 1980.

COUNT I

The District Attorney of the County of Riverside hereby accuses ALBERT GREENWOOD BROWN, JR., of a violation of Section 187 of the Penal Code, a felony, in that on or about October 28, 1980, in the County of Riverside, State of California, he did wilfully, unlawfully, and with malice aforethought murder SUSAN LOUISE JORDAN, a human being.

The District Attorney of the County of Riverside further charges that before the commission of the offense hereinabove set forth in Count I of the Information, that the murder of SUSAN LOUISE JORDAN was committed by defendant(s) ALBERT GREENWOOD BROWN, JR., while the defendant(s) was engaged in the commission of the crime of RAPE in violation of Section 261 of the Penal Code, within the meaning of Penal Code Section 190.2(a)(17) (Subsection (iii)).

COUNT II

For a further and separate cause of action, being a different offense from but connected in its commission with the charge(s) set forth in Count(s) I hereof, the District Attorney of the County of Riverside hereby accuses ALBERT GREENWOOD BROWN, JR., of a violation of Section 261, Subdivision 2 and Subdivision 3 of the Penal Code, a felony, in that on or about October 28, 1980, in

the County of Riverside, State of California, he did wilfully and unlawfully have and accomplish an act of sexual intercourse with a female person, to wit, SUSAN LOUISE JORDAN, not his wife, where she resisted but her resistance was overcome by force and violence and where she was prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution.

FIRST PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offense set forth in Count II of this Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted of the crime of FORCIBLE RAPE, a felony, in violation of 261, Subdivision 3 of the Penal Code Code, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said conviction, within the meaning of Penal Code Section 667.6, Subdivision (a).

SECOND PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offenses set forth in Counts I and II of this Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted of the crime of FORCIBLE RAPE, a violent felony, in violation of Section 261, Subdivision 3 of the Penal Code, and that he then served a separate term in state prison for said offense(s), and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of

said term, within the meaning of Penal Code Section 667.5(a).

BYRON C. MORTON
District Attorney
By: /s/ Don R. Inskeep
DON R. INSKEEP, Chief
Deputy District Attorney

DRI:mp

Amended Information of District Attorney.

In the Superior Court of the State of California, in and for the County of Riverside.

The People of the State of California, Plaintiff, v. Albert Greenwood Brown, Jr., Defendant(s). No. CR. 18104.

Filed: October 5, 1981.

COUNT I

The District Attorney of the County of Riverside hereby accuses ALBERT GREENWOOD BROWN, JR., of a violation of Section 187 of the Penal Code, a felony, in that on or about October 28, 1980, in the County of Riverside, State of California, he did wilfully, unlawfully, and with malice aforethought murder SUSAN LOUISE JORDAN, a human being.

The District Attorney of the County of Riverside further charges that before the commission of the offense hereinabove set forth in Count I of the Amended Information, that the murder of SUSAN LOUISE JORDAN was committed by defendant(s) ALBERT GREENWOOD BROWN, JR., while the defendant(s) was engaged in the commission of, attempted commission of, and immediate flight after committing and attempting to commit the crime of RAPE in violation of Section 261 of the Penal Code, within the meaning of Penal Code Section 190.2(a)(17)(iii).

COUNT II

For a further and separate cause of action, being a different offense from but connected in its commission with the charge(s) set forth in Count(s) I hereof, the District Attorney of the County of Riverside hereby accuses ALBERT GREENWOOD BROWN, JR. of a violation of Section 261, Subdivision 2 and Subdivision 3 of the Penal Code, a felony, in that on or about October 28, 1980, in

the County of Riverside, State of California, he did wilfully and unlawfully have and accomplish an act of sexual intercourse with a female person, to wit, SUSAN LOUISE JORDAN, not his wife, where she resisted but her resistance was overcome by force and violence and where she was prevented from resisting by threats of great and immediate bodily harm accompanied by apparent power of execution.

The District Attorney of the County of Riverside further charges that during the commission of the above offense, the said defendant(s) ALBERT GREENWOOD BROWN, JR. inflicted great bodily injury upon SUSAN LOUISE JORDAN, within the meaning of Penal Code Section 12022.8.

FIRST PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offense set forth in Count II of this Amended Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted of the crime of FORCIBLE RAPE, a felony, in violation of Section 261, Subdivision 3 of the Penal Code, and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.6(a).

SECOND PRIOR OFFENSE:

The District Attorney of the County of Riverside further charges that before the commission of the offense set forth in Counts I and II of this Amended Information that said defendant, ALBERT GREENWOOD BROWN, JR., was on or about April 18, 1978, in the Superior Court of the State of California, for the County of Riverside, convicted

of the crime of FORCIBLE RAPE, a violent felony, in violation of Section 261, Subdivision 3 of the Penal Code, and that he then served a separate term in state prison for said offense(s), and that he did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of ten years subsequent to the conclusion of said term, within the meaning of Penal Code Section 667.5(a).

BYRON C. MORTON
District Attorney
By: /s/ Robert G. Spitzer
ROBERT G. SPITZER.
Deputy District Attorney

RGS:cjo

Motion of Press-Enterprise Company Regarding Attendance at Voir Dire Examination.

Superior Court of the State of California, for the County of Riverside.

People of the State of California, Plaintiff, vs. Albert Greenwood Brown, Defendant. No. CR 18104.

Filed: October 19, 1981.

Petitioner herein is the PRESS ENTERPRISE COMPANY, a California corporation, which publishes newspapers known as The Press and the Enterprise in Riverside, California. Petitioner herein is not a party in these proceedings in the formal sense of the word, but through its representatives has been an observer of the proceedings prior to trial and has reported those proceedings through its newspapers.

Petitioner herein seeks to keep the voir dire examination of jurors and the entire jury selection process open to the public and subject to reporting by its newspapers. Petitioner believes, on the basis of statements made by the court in these proceedings, that the public nature of the voir dire examination and the openness of that initial portion of the trial may be imperiled. It is petitioner's understanding that the court intends on completing the voir dire examination of all jurors outside of the presence of the public and the press.

Petitioner believes it has standing in these proceedings to object to such procedures based upon cases from the California Appellate Court and the Supreme Court of the United States.

PETITIONER'S STANDING—THE PUBLIC INTEREST

In the landmark decision of *Richmond Newspapers, Inc. vs. Commonwealth of Virginia*, 100 Sup. Ct. 2814, Chief Justice Berger stated in unequivocal language, "we hold

that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of 'of the press could be eviscerated'. *Branzberg vs. Hayes*, 408 U.S. 681, 92 Sup.Ct. 2656."

Justice Berger, at another point in the opinion in the *Richmond Newspapers* case, declared specifically that media representatives enjoyed the same right to access to criminal trials as the public.

It has been established in California that under the common law and under our statutory law, trials are intended to be open to the public subject only to limited exceptions. *Kirstowsky vs. Superior Court of Sonoma County*, 143 Cal.App.2d 745.

Petitioners herein are, in short, attempting to assert what has been described as a "independent public interest in the enforcement of the Sixth Amendment guarantee of a public trial." *Gannett Co. vs. DePasquale*, 99 Sup.Ct. 2898. Members of the public at large, and particularly representatives of the media who have a direct and personal interest in participating in criminal trials as spectators. As such, they are appropriate parties to object to their exclusion from the trial. A criminal trial is a public event. *Craig vs. Harney*, 331 U.S. 367. The public has a right to be informed as to what occurs in its courts. *Estes vs. Texas*, 381 U.S. 532.

THE SIXTH AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

The Sixth Amendment provides that in all criminal prosecution the accused shall enjoy the right to a public trial. This provision of the Bill of Rights sprang from the deep-seated distrust of our forefathers of secret trials. The United States Supreme Court, in considering the *Richmond News-*

papers case cited above, and in the summer before the *Gannett Co. vs. De Pasquale* case, examined in depth the history of jury trials in England and America. It was the conclusion of the majority of the justices that the right to a public trial was not a right given simply to the accused, but was a right enjoyed in an unbroken tradition by the public for centuries under the Anglo-American judicial system.

In the *Kirstowsky* case cited above, the defendant requested the exclusion of the public from the trial and claimed that it was her right to waive her right to a public trial. The court held that that alone was not determinative of the issue in that the public had a right to attend the trial as well. In other words, it is established under our law that the defendant has a right to a public trial, but it is not established that the defendant has the right to a private trial.

The public's interest may be quite different from the interest of an individual defendant. The public interest is based on broad, societal functions such as the informing of the public enabling the victim and his family to satisfy themselves that justice has been done and promoting the appearance of justice. The protection of the public's interest cannot be entrusted to the defendant, and as in the *Richmond Newspapers* case, although the defendant may seek a closed trial, the rights of the people can transcend those of the defendant.

THE FIRST AMENDMENT PROTECTS THE RIGHT OF THE PUBLIC TO ATTEND CRIMINAL TRIALS.

It has been established that one of the major purposes of the First Amendment was to protect the free discussion of governmental affairs. *Mills vs. Alabama*, 384 U.S. 214; *Garrison vs. Louisiana*, 379 U.S. 64. The public has a right

to know what occurs in its courts. *Estes vs. Texas*, 381 U.S. 532.

Free speech does not simply entail the dissemination of information, but requires also the right to gather information. See *Branzburg vs. Hayes, supra*. In other words, unless the media is to gather the information, its right to disseminate it is meaningless.

> "A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by the impressive record of service over several centuries. The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors and judicial processes to extensive public scrutiny and criticism. This court has, therefore, been unwilling to place any direct limitations on the freedom traditionally exercised by the news media for 'what transpires in the courtroom is public property'."
> *Sheppard vs. Maxwell*, 384 U.S. 333.

PROTECTION OF THE DEFENDANT'S RIGHT TO A FAIR TRIAL DOES NOT REQUIRE THE EXCLUSION OF THE PUBLIC FROM THE VOIR DIRE EXAMINATION IN THIS CASE.

A number of the cases cited herein and others which have dealt with this subject acknowledge the right of the court to exercise control over the spectators and control over the proceedings in general. A number of the cases feel that the right of the public to observe trials is not unlimited. Reference is made in various ways to the limitations of the right of the public to attend trials and the circumstances under which the public can be excluded from portions of the proceedings. The questions in this area are not easy. The court herein apparently intends on excluding the public entirely

from the voir dire examination. It is believed by petitioner herein that the basis for such an exclusionary rule is the case of *Hovey vs. Superior Court of Alameda County*, 28 Cal.3d 1. The *Hovey* case establishes the procedures regarding "death qualification" of jurors. It requires that venire persons be interrogated regarding death qualification outside of the presence of other venire persons, the reasoning of the case being that listening to others being interrogated tends to have an influence on the jurors and the presence of other venire persons tends to intimidate the people under interrogation.

Petitioner herein finds no fault with the procedure set forth in the *Hovey* case. Petitioner suggests, however, that the court herein intends on going well beyond the admonitions of the *Hovey* case into an area of infringement of the rights of the public and the press set forth in the paragraphs above. Nowhere in the *Hovey* decision is it stated that the public or the press must be excluded from the voir dire for death qualification. The court in that case was concerned only with the influence of other prospective jurors upon the person being interrogated.

Further, in this case the court proposes to go beyond the sequestering of venire persons for the matter of death qualification and complete the voir dire totally in private.

The court in this case has elected a procedure far too drastic and far too violative of the basic rights to a public trial. Alternate, less drastic, procedures could be followed to protect the rights of the defendants while preserving the rights of the public. The cases set forth in the paragraphs above establishing the rights of the public and the press to attend the said criminal trials require the establishment of alternate procedures when dealing with the obvious right of the defendants to a fair trial.

The empanelment of the jury is the first of a series of actions which comprise the term "public trial." *People vs. Teitelbaum*, 163 Cal.App.2d 184. In a very real sense, the empanelment of the jury is the most important portion of the whole trial procedure. If we could conceive of a procedure whereby the jury was empaneled in secret and the rest of the trial was public, an observer from the outside would be forever suspicious that the system had been compromised or contaminated at the first and most important phase, namely, the selection of the trier of fact. It is imperative that the appearance of justice be maintained from the outset of the trial.

Petitioner herein respects and acknowledges the right of the defendants in this action and in all criminal actions to a fair trial and sympathizes with the position of the counsel, both prosecution and defense, in connection with the presentation of their respective cases. Petitioner is mindful of the burden and the obligation of the court in balancing the rights of the defendants and the rights of the public. Petitioner believes, however, that in the name of a fair trial for the defendants, long established rights of the public to access to the trial should not be set aside, even under the admonition of the *Hovey* case. All reasonable efforts should be made by this court to find an alternative method of empaneling the jury short of closure of that portion of the trial.

DATED: October 19, 1981.

THOMPSON & COLEGATE

By /s/ James D. Ward

JAMES D. WARD

A Professional Corporation.

Attorneys for Petitioner.

Motion of Press-Enterprise Company for Release of Transcript of Voir Dire Proceedings and Court Orders Re Preliminary Evidentiary Motions of Defendant, Albert Greenwood Brown.

Superior Court of the State of California, for the County of Riverside.

People of the State of California, Plaintiff, vs. Albert Greenwood Brown, Defendant. No: CR 18104.

Petitioner, PRESS-ENTERPRISE COMPANY, a California corporation, respectfully petitions this court for an order releasing the following court records:

1. The complete transcript of the voir dire proceedings covering the empanelment of the jury in the above entitled criminal action;

2. Release of all, heretofore suppressed court orders concerning evidentiary matters submitted to this court for rulings by PEOPLE OF THE STATE OF CALIFORNIA and defendant, ALBERT GREENWOOD BROWN.

The petition is made on the grounds that the public has an independent right to attend criminal trials, along with access to various court rulings concerning the evidence to be presented in this criminal action.

This petition and motion is based upon these moving papers, the points, authorities and argument submitted here and any other oral and documentary evidence presented at the time of the hearing in this matter, currently scheduled for hearing on Wednesday, December 30, 1981, in Department 5 of the above entitled court, located at 4050 Main Street, Riverside California.

STATEMENT OF FACTS

In the instant case, defendant, ALBERT GREENWOOD BROWN, is charged with first degree murder in the alleged strangulation of a teenage girl in the City of Riverside.

Certain evidentiary motions have been made by defendant, ALBERT GREENWOOD BROWN, to suppress the introduction of evidence at the time of trial. The case is currently set for trial, however, the court has not released to the public the court's ruling on the evidentiary motions.

Further, on or about October 19, 1981, petitioner herein made a motion to allow the public to attend the voir dire proceedings in the above entitled action. Under the decision of *Hovey vs. Superior Court*, and defendant's opposition, the court felt that voir dire proceedings should be closed with regard to the death qualifying issues.

It is understood that the court now intends to not release the transcript of the voir dire proceedings at the conclusion of the voir dire proceedings, and has not stated at which point in the trial or after the conclusion of the trial the transcript will be made available to the public.

It is on the above facts that the instant petition and motion is brought to this court.

DATED: December 28, 1981

THOMPSON & COLEGATE

BY: /s/ John A. Boyd
JOHN A. BOYD
Attorneys for Petitioner,
PRESS-ENTERPRISE
COMPANY

MEMORANDUM OF POINTS, AUTHORITIES AND ARGUMENT

Petitioner, PRESS-ENTERPRISE COMPANY, submits the following points, authorities and argument in support of its petition:

I

PETITIONER HAS STANDING TO SEEK THE RELEASE OF THE TRANSCRIPT AND ORDERS.

In the recent landmark decision of *Richmond Newspapers, Inc. vs. Virginia*, 488 U.S. 555, 100 S. Ct. 2814 (1980) stated this important right as follows.

> "We hold the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, the important aspects of speech and of 'of the press could be eviscerated' ". *Richmond Newspapers, Inc. vs. Virginia*, 488 U.S. 580, 100 S. Ct. 2829.

Therefore, petitioners have standing to seek relief in this court through this appearance.

II

BY SUPPRESSING THE RELEASE OF THE TRANSCRIPT AND ORDERS THIS COURT HAS EFFECTIVELY IMPOSED A "GAG" ORDER OVER THE PROCEEDINGS IN THE CRIMINAL ACTION.

It cannot be argued that the failure to release the transcript of the voir dire proceedings and the orders of this court on the evidentiary motions by the litigants has effectively and conclusively prevented the public from attending those aspects of this criminal trial. Further, this amounts to a type of "gag" order by prohibiting the dissemination of the information concerning the voir dire proceedings and those

evidentiary motions to the public through the parties or their counsel, as well as court personnel.

In a somewhat similar case, it was decided by the United States Supreme Court in the case of *Nebraska Press Association vs. Stuart*, 427 U.S. 539, 96 S. Ct. 2791 (1976). In the *Nebraska* case, the trial court in a murder case issued an order restraining the media from publishing or broadcasting the counts of confessions or admissions made by any of the accused or any facts strongly implicating the defendants until the jury was empaneled. The United States Supreme Court reversed the Nebraska Supreme Court, which had modified the trial court's order.

The Supreme Court cited numerous authorities and concluded there was a common theme in the free speech cases that dealt with "prior restraints":

> "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law sanctioned become fully operative.
>
> "A prior restraint by contrast and by definition is an irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for a time.
>
> "The damage can be particularly great when prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment." *Nebraska Press Association vs. Stuart*, 427 U.S. 556.

The *Nebraska Court* went on to discuss possible alternatives of prior restraint:

> "Most of the alternatives to prior restraint and their circumstances were discussed with obvious approval in *Sheppard vs. Maxwell*, 384 U.S. 357-362, 16 L. Ed 2d 600, 86 S. Ct. 1507 (parallel citation omitted):
>
> (a) Change of trial venue to a place less exposed to the intense publicity it seemed eminante in Lincoln County;
>
> (b) Postponement of the trial to allow the public attention to subside;
>
> (c) Searching questioning of perspective jurors, as Mr. Chief Justice Marshall used in the Burr case to screen out those fixed opinions as to guilt or innocence;
>
> (d) The use of emphatic and clear instructions on the sworn duty of each juror to decide the issue only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pre-trial publicity and imphasizes the elements of the jurors oaths." *Nebraska Press Association vs. Stuart*, 427 U.S. at 563-564.

The *Nebraska Court* also discussed the argument that pre-trial publicity invariably resulted in an unfair trial as follows:

> "We have noted earlier that pre-trial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The deciding cases 'cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives defendant of due process." *Murphy vs. Florida*, 421 U.S. at 799 (parallel citations omitted). Appellate evaluation as to the impact of publicity take into account what other

measures were used to mitigate the adverse effects of publicity. The more difficult perspective or predicative assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice." *Nebraska Press Association vs. Stuart*, 427 U.S. at 565.

The Court went on to discuss whether or not an impartial jury could be selected:

"The record demonstrates as the Nebraska courts held, that there was indeed a risk that pre-trial news accounts, true or false, would have some adverse impact on the attitudes of those who might be called as jurors. On the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found, who would, under proper instruction, fullfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pre-trial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pre-trial publicity can work, but the probability that it would do so here has not been demonstrated with the degree of certainty are cases on prior restraint required." *Nebraska Press Association vs. Stuart*, 427 U.S. at 568-569.

In the instant case, on the eve of trial, petitioners are asking that this court make clear the record involving the selection of the jurors and the admissibility of evidence that was obtained by law enforcement agencies with the purpose of prosecuting the defendant, for the public and secondarily, the press that serves the public.

III

ALTHOUGH NOT BINDING ON THIS COURT, IN THE SIMILAR FACTUAL SITUATION, DIVISION II OF THE FOURTH DISTRICT COURT OF APPEALS HELD THAT THE TRANSCRIPT MUST BE MADE AVAILABLE AT THE CONCLUSION OF THE VOIR DIRE PROCEEDINGS.

In another pending criminal case, People of the State of California vs. George Wayne Smith, Christopher Gregory Harven, and Russell Aaron Harven, San Diego Superior Court Number CRN 6940, formerly of Riverside Superior Court Number CR 17751, the Fourth District Court of Appeals, Division II on a Petition for Writ of Certiorari brought by the petitioners herein ordered that the transcript of voir dire proceedings must be made available at the conclusion of the voir dire proceedings. A copy of said order is attached hereto as Exhibit "A".

While the order was unpublished, it clearly sets the tone for the balance that must be achieved between the rights of the defendant and the independent rights of the public to attend the criminal trials.

CONCLUSION

This court is faced with the possibility of excluding from the public the basis decided from previous rulings of this court, for the introduction of the evidence against the defendant, as well as a transcript of the voir dire proceedings concerning the most important aspect of this case, that being the qualification of the jurors to decide the fate of one man's life, to some point in the future that is yet to be decided.

In a system of laws that govern men, the theme is to allow equal justice under the law. If the public is unable to hear that "equal justice under the law" has been provided, then how can such a system work? It is respectfully

submitted that the public has a right at the onset of a trial to complete disclosure concerning all pre-trial motions which will effect the admissibility of evidence to be presented at that trial. Further, the closure of the voir dire proceedings and the supposed purpose it serves, cannot be served any longer after that jury is empaneled.

Based upon the foregoing points, authorities and argument, it is respectfully submitted that this court grant petitioners relief, and release the transcript of the voir dire proceedings when the jury is empaneled, and release this court's earlier rulings concerning the defendant's motions to suppress evidence.

DATED: December 29, 1981

Respectfully submitted,
THOMPSON & COLEGATE
BY: /s/ James D. Ward
JAMES D. WARD
Attorneys for Petitioner,
PRESS-ENTERPRISE
COMPANY

EXHIBIT A

Court of Appeal — State of California, Fourth Appellate District, Division One.

The San Diego Union v. Superior Court etc., County of San Diego. 4 Civil No. 24896.

Press-Enterprise Co., vs. Superior Court etc., County of San Diego. 4 Civil No. 24897.

SUPERIOR COURT NO. CRN 6940

Filed: June 30, 1981.

THE COURT:

The petitions for writ of mandate have been read and considered along with lodged opposition. Provided the trial court permits transcription of the closed portions of the voir dire examination, to be released to the press and public when the public part of the trial begins, and further provided the trial is open to the public from the time the first witness is sworn, the trial court is acting within its discretion here. The petitions are denied without prejudice to applications for further relief should these conditions be violated.

/s/ Brown
Presiding Justice

Copies to: Gray, Gray, Ames & Frye-SD
Thompson & Colegate-Riv.
District Attorney-Riv.
District Attorney-SD
Superior Court-SD

Letter From Joseph Peter Myers, Regarding December 30, 1981, Motion.

[Letterhead]

Filed: December 30, 1981.

December 16, 1981

Hon. J. William Mortland
Judge of the Superior Court
Riverside County Courthouse
4050 Main Street
Riverside, California 92501
HAND DELIVERED

re: People vs. Albert Brown, Jr.

Dear Judge Mortland:

In an article appearing in this morning's edition of the Press-Enterprise, Mr. Bowman, the reporter, indicated that this Court's sealing of the transcripts of the voir dire in this matter might be lifted upon the initiation of the trial. I have not yet had the opportunity to research the matter, and, therefore, do not know the circumstances of the "appellate opinion" to which Mr. Bowman refers.

Because of the urgency of this problem, I am taking the liberty of writing this letter to the Court. I believe that this Court's Order sealing the transcripts must stand until and unless it is challenged and reversed in some manner. I had already indicated to Mr. Bowman that the public simply had no legitimate interest in the transcripts, and that publication of their contents would constitute an enormous invasion of the privacy of jurors and prospective jurors. These people simply had no choice in the matter. They were required to attend and answer the questions asked by the Court, the District Attorney and me. While they might choose themselves to reveal their lives to the press at some later time, it would be completely improper to allow the

press to seize upon this opportunity to broadcast personal and intimate details about which they were questioned.

Should such a challenge by the press occur in this Court, as I believe it may, it seems to me that proper parties to any hearing would include each of the persons interviewed — those who will be sitting as jurors or alternate jurors and those who were excused. It is their privacy which the press would seek to invade, and they must surely have standing before this Court to present their views. Accordingly, I believe that this Court may legitimately require notice to each of the persons interviewed, and service of any moving papers seeking to challenge the sealing of the transcripts upon such persons. Further, although the Court might feel inclined to allow the attorneys for the moving party to know the names of those persons, the provision of addresses or other data would seem a burden which the moving party ought to sustain.

Further, it seems to me that prospective jurors deserve representation in such a proceeding. I believe that it might be possible to order not only personal service of any moving papers on prospective jurors, but to require that the moving party reimburse or pay the cost of legal representation. It is, quite obviously, not an expense which the Court need bear.

Frankly, I fear that the Press-Enterprise article, if it can be interpreted as a claim that the confidentiality of the proceedings will be destroyed, may well create a serious problem for the parties to this proceeding. It seems to me that it may well cause a good deal of fear on the part of the jurors or their families, and might cause even more unwanted calls to Mrs. Hall by jurors stating that they will not now serve.

I will continue to research the legal aspects of this matter, and will seek some assistance from Mr. Spitzer in that effort.

Respectfully,

/s/ Joseph Peter Myers
JOSEPH PETER MYERS

JPM:moi

cc: Robert G. Spitzer

Ex Parte Application of Press Enterprise Company to Release the Transcript of the Voir Dire Proceedings.

People of the State of California, Plaintiff, vs. Albert Brown, Defendant. Case No: CR 18104.

Petitioner, PRESS-ENTERPRISE COMPANY, a California corporation, respectfully petitions this court for an order releasing the following:

1. The complete transcript of the voir dire proceedings covering the empanelment of the jury in the above entitled criminal action.

The petition is made on the grounds that the criminal trial has been completed, both the guilt and penalty phases and this court has on this day sentenced ALBERT GREENWOOD BROWN, the defendant in that action.

On December 30, 1981, petitioner made a similar motion, that the court at that time denied without prejudice the motion to release a transcript of the voir dire proceedings. (Please see attached as Exhibit "A" the transcript of the proceedings, p. 3989, 3990.

The instant application is made on the basis that since the criminal trial is over, no prejudice could exist at this time to the defendant since he has already been tried.

Said motion is made on this application and the attached exhibit and the points and authorities submitted herewith.

MEMORANDUM OF POINTS & AUTHORITIES

I

PETITIONER HAS STANDING TO SEEK THE RELEASE OF THE TRANSCRIPT AND ORDERS.

The case of *Richmond Newspapers, Inc. vs. Virginia*, 488 U.S. 555, 100 S. Ct. 2814 (1980) discussed the right of the public to attend trials.

"We hold the right to attend criminal trial is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, the important aspects of speech and of 'of the press could be eviscerated' ". *Richmond Newspapers, Inc. vs. Virginia*, 488 U.S. 580.

Therefore, the public has the right to attend criminal trials, and when they have been barred from the courtroom, should at a minimum, to protect those rights have access to the transcript.

DATED: February 22, 1982

THOMPSON & COLEGATE
BY: JAMES D. WARD
Attorneys for Petitioner

EXHIBIT A.

THE COURT: Yes.

MR. WARD: All right.

THE COURT: And the motion of the Press-Enterprise which has been received by the Court is received, ordered filed.

I don't know if we have any filing fee problems or not.

THE CLERK: I think we have overcome that, Your Honor.

THE COURT: Very good.

It's ordered filed and as part of the record.

The motion to conduct extended media coverage is received and ordered filed and as soon as the People have indicated they would consent and we will leave it up to them and hear what defendant decides after counsel has had an opportunity to interview him.

The defense motion in limine is received and ordered filed as of December the 28th, 1981, we will take up next. But on Mr. Ward's motion on behalf of the Press-Enterprise, and incidentally the request for extended coverage I deem it to be a clerical error, that it is addressed to this Court and not the Municipal Court, it indicates that I am the Judge, and so I assume it simply was an oversight that it has the Municipal Court name on it.

The motions at this stage of the proceedings is denied without prejudice.

I agree with much of what the defense counsel and People's counsel have said and I also, regardless of the public's right to know, I also feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas that the right to

privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think, should have some limitations and, so, at this stage, the motion to open up anything that's been ordered sealed, including, again, the individual sequestered voir dire proceedings is denied without prejudice.

MR. WARD: Thank you, Your Honor.

THE COURT: Thank you.

MR. MYERS: Thank you.

MR. SPITZER: Thank you, Your Honor.

THE COURT: We will take up, I will advise counsel of one thing that I presume we will probably have to take up when Mr. Reiss is available, Alternate Number 2, Mr. Brian Reiss called in several days ago, last week sometime. He has a new job that they want him to commence on January the 18th so he is requesting to be excused.

I have just made a note of it and we will take it up when he is available and act on it as might be appropriate.

Now, we will proceed to the motion in limine.

The motion in limine seeks to relate to all proffered testimony of the Department of Justice, to-wit, Faye Springer, regarding comparison of footprints. Testimony of the Department of Justice, including Faye Springer, relating to circumstantial evidence of blood or semen types.

Letter of Joseph Peter Myers Dated March 10, 1982.

[Letterhead]

March 10, 1982

Hon. J. William Mortland
Judge of the Superior Court
4050 Main Street
Riverside, California 92501

Re: PEOPLE vs. ALBERT G. BROWN, JR.
Case No. CR 18104

Dear Judge Mortland:

On Friday, February 25, 1982, I received a copy of your Minute Order of February 23, 1982, regarding the Ex Parte application of the Press Enterprise Company to release transcripts of the *voir dire* proceedings in the above matter. At the outset, I was appalled that the application was made on an Ex Parte basis. It should have been obvious to the attorneys for the applicant that other counsel had been involved in this matter for some time, and had stated positions for the record on numerous occasions regarding the subject of the application.

Again, counsel for the Press Enterprise Company chose not to provide any notice whatsoever to the persons whose right to privacy is most clearly at stake, namely, the jurors and prospective jurors who had no choice but to divulge their deepest feelings and secrets during the process of jury selection. In my view, it is an outrage that the attorneys for the Press Enterprise Company could be allowed to make such a motion without providing proper notice to those individuals and allowing the matter to be fully heard. Obviously, it is the intention of the Press Enterprise Company, through its counsel, to avoid the existence of any possible record of testimony or rational argument made specifically on behalf of members of the venire and, thus, to prevent

the appellate courts within this State and in the Federal system from fully considering the serious issues which are present.

The process of jury selection in this case, confirmed by my conference with various jurors after the verdict was rendered, amply demonstrated that individuals could not possibly have been as direct or open with us in revealing their true feelings and experiences if they felt that their statements would become a matter of public record. We would have been faced, had that been the situation, with far less honesty on the part of potential jurors in areas that were of extreme importance to the prosecution and defense. It would be hard to fault a lack of candor on the part of a prospective juror given the specter of revealing perhaps extremely embarrassing information to the public.

If the Court were to use an alternative method of deleting such information from the record, however, it would be impossible for appellate courts reviewing the record to determine whether or not claims of improper exclusion of potential jurors are proper. As the Court is surely aware, such claims of error in the process of jury selection are often the basis for reversal in trials where the presentation of evidence is conducted without error.

Although I am certainly in agreement with the denial of the application of the Press Enterprise Company to open the transcripts of the jury selection process, I had hoped that the Court would have taken the option of insisting that the real parties in interest be provided with adequate notice of that application and, themselves, provide the Court with the

true justification for rejecting the application. I am requesting that this letter be made a part of the record in this matter.

Respectfully,

/s/ Joseph Peter Myers
JOSEPH PETER MYERS

JPM:kdm

cc: Robert Spitzer, Esq.
Office of the District Attorney
James D. Ward, Esq.
Thompson & Colegate

Order Below.

The following orders have been omitted in printing this appendix because they appear in the appendix to the printed Petition for Certiorari:

(a) Order of Court of Appeal, State of California, Fourth Appellate District, Division Two of May 13, 1982

(b) Notice of Entry of Order Denying Hearing in the Supreme Court of the State of California on June 30, 1982

Reporter's Partial Transcript of Oral Proceedings.

Superior Court of the State of California, for the County of Riverside.

People of the State of California, Plaintiff, vs. Albert Greenwood Brown, Jr., Defendant. No. CR-18104.

Before Hon. J. William Mortland, Judge, Dept. V, Monday, October 19, 1981.

APPEARANCES:

For the Plaintiff:

BYRON C. MORTON
District Attorney
4080 Lemon Street
Riverside, California 92501
BY: ROBERT G. SPITZER
Deputy District Attorney

For the Defendant:

JOSEPH PETER MYERS
Attorney at Law
4075 Main Street
Riverside, California 92501

Also Present:

THOMPSON & COLEGATE
Attorneys at Law
3737 Main Street, Suite 600
Riverside, CA 92501
BY: JAMES D. WARD

Reported By:

WILLIAM A. BEAM, C.S.R.
License No. 1354

[1] Riverside, California, Monday,
October 19, 1981, 10:03 A.M.

THE COURT: We will take the matter of the People vs. Albert Greenwood Brown, Jr., CR No. 18104.

It is noted that Mr. Brown is present with his counsel, People's counsel is present, and I have been presented with four motions.

I also note that the representative of the Press-Enterprise, and for anything that you might wish to put on the record, Mr. Ward, we will be happy to hear it.

MR. WARD: At this time, your Honor?

THE COURT: Yes.

MR. WARD: Your Honor, I do have a written motion.

THE COURT: And we will receive the response of respective counsel.

MR. WARD: All right. I have a written motion that I would like to submit, your Honor, I will just file those papers with the Court at the present time. I perhaps should set forth orally the position of my client, the Press-Enterprise in connection with this matter.

THE COURT: All right.

MR. WARD: Your Honor, it is our understanding that the Court intends on a basis of the *Hovey* decision to sequester the voir dire persons in connection with the interrogation of those persons regarding their death penalty qualifications. Now that, perhaps, is presumptious on our part, in that we do not know for sure what the Court's procedures are going to be, [2] but if the Court were to follow those procedures of Judge Hennigan or Judge McFarland, although they varied somewhat in the process that they used, we would have a problem with that procedure as we have with any problem where the public is excluded from the trial of the action.

I pointedly indicate, your Honor, that our objection is the exclusion of the public because we don't stand here simply

as the representative of the Press or a single newspaper, but we stand here representing the right of the public to attend all phases of the trial of the action itself.

It is our position, your Honor, that the public has an absolute right to attend the trial of the action and that it is further our contention that the trial of the action in that regard commences with the voir dire of the jury. We believe, in fact, in many ways that the selection of the jury is perhaps the most critical portion of the trial, because in the selection of the 12 or more, with some alternate persons who will try the case, therein lies the ultimate decision-making body that will determine the fate of the action. We think to exclude the public from that process is a serious violation of the rights of the public to access to the trial.

We believe and recognize the rights of defendants. We understand the position set forth by the Supreme Court in the *Hovey* decision, but we do not find any inconsistency with the public right of access to the trial and the rights of the defendant, even under the decision in *Hovey*.

It is our position, your Honor, that the Supreme [3] Court said that voir dire persons were to be sequestered, one from another, in connection with the questions regarding their opinions on capital punishment. There was no determination and no language in that opinion which said that the trial had to be closed. In fact, the Chief Justice made the remark that this procedure, which was referred to, the sequestering of the voir dire persons, one from another, would in no way restrict the openness of the trial of the action and that was a direct statement of the Chief Justice in connection with the opinion.

We believe, your Honor, that this is a problem that must be resolved. We have taken it up through the Supreme Court on two occasions before, and unfortunately they have not

as yet been willing to give us a hearing on the matter. We are at present preparing a petition for a writ of certiorari to the United States Supreme Court. Not only for the purpose of consistency do we arrive here again to address the issue, but because we feel that it is so important. We know that there are a number of capital cases coming up in this county and they are coming up all across the state. We feel there is possibility here of an erosion of rights. We feel that the possibility is that for the purposes of death qualifications of the jurors, the public would be excluded. The next easy step would be to exclude the public from all of the voir dire of the jury, such as was done in the San Diego case being handled by Judge Hennigan, where the jury was and is being interrogated in chambers.

We feel, your Honor, that it's an erosion of the very important right and one that we must repeatedly assert [4] to the Court. Of course, the cases that we stand on are set forth in our petition. We point, of course, most specifically to the Richmond newspaper case where the United States Supreme Court, through Chief Justice Berger, stated so clearly that under the Constitution the public does have a right to open trials.

I ask, therefore, that the Court consider its rulings in connection with the voir dire of the jury and we ask specifically that even following *Hovey* and the sequestering of voir dire persons, one from another, as to the death qualifications questions, that the whole process remain open to the public.

Now, you must consider, your Honor, the implications of that. We don't feel that in the long run, once this issue is resolved in our favor, that there is going to be any great clamor to cover the questioning of potential jurors in this or any other kind of case. It's a long and frankly dull process and we don't fear any great need to cover it at great public

involvement in the process, but the denial of the public involvement is a violation of the right that we fear so much.

If, either in and of itself or as a step to the future denial of the public's right to trial. And that is our position, your Honor, and if the Court has any questions as to our position, I would be happy to address them.

THE COURT: I have no questions. I think I understand your position. We will hear from counsel.

MR. MYERS: Yes, your Honor. Essentially, your Honor, [5] I think the Court is aware that our undertaking jury selection in this case may very well be as Mr. Ward states, one of the most important parts of the case itself. The fact that jury selection is important and the fact that it is, in fact, critical and deserves the attention of the appellate courts and trial courts in cases such as *Hovey* and *Witherspoon* and all the cases that have dealt with that process and the potential for abuse which may occur in that process, does not make it, simply stated, that part of the process a part of "the trial." I think the assumption that the petitioner Press-Enterprise makes in this case is that jury selection is the trial and is simply one part of the trial. Our position would be on a technical ground, your Honor, that that is simply not so.

The trial does not, in fact, commence until the jury has been sworn and generally a witness has been sworn. That is when it may be said that jeopardy attaches to a defendant. And I believe on that technical ground alone, the Court can refuse to grant the petition of the Press-Enterprise for public access to the jury selection process.

Mr. Ward makes some arguments that I think are most interesting and deserve some comment on our part. One is that even if the Court were to grant the motion or petition, that there would be no great clamor to cover the jury se-

lection in this or in any other capital case. In other words, what Mr. Ward is saying is that the Press will itself, somehow, by the judgment of the reporter or perhaps editor, makes its determination of whether it has interferred with this very difficult and important process of jury selection.

[6] He assures us that, well, the process is somewhat boring and therefore obviously it would not be terribly interesting for the reporter or for the readers of the news media, and I think, in fact, that he is right. The Court is faced with a balancing problem in this and other cases involving the First Amendment right of the public to know where freedom of the press and what is it that the public is supposed to know.

Mr. Ward's procedure or proposed procedure, I don't think the public has a legitimate interest in the deep feelings of individual prospective jurors about the death penalty, about the facts in this case or in any other, about their family situation. By being on a jury, I don't think people expose themselves to becoming public personalities. I don't think they place themselves or should in any way be seen as placing themselves in the position where their deep feelings can be found out by someone else, a neighbor reading the morning newspaper, unless they choose to discuss that situation with the newspaper after the process of jury selection is finally over.

It seems to me that by forcing people to have an extra shell about themselves during jury selection, knowing that a reporter is present in the room, such a prospective juror will not be able to provide the Court or counsel with the kind of candor that is required.

Since the recent decision allowing voir dire, even for the exercise of peremptory challenges, obviously prospective jurors can be questioned at even more in detail and in depth

about their most personal and private feelings. [7] It is one thing to sit as a juror in a case having revealed those feelings to a judge and to attorneys who presumably are not going to race out and discuss these with the Press or with any other person. It is quite another to know that a reporter is present or perhaps a photographer recording these particular feelings, and I think the natural inclination of anyone would be to refuse to divulge them, to refuse to be placed under a microscope or subject to public scrutiny, and, in effect, dissection.

I think an example of what can happen in these situations is shown in the recent case in Los Angeles involving a civil matter, the moving of the Los Angeles Rams. And the veritable circus of comment by counsel and comments by jurors that followed that case and its mistrial.

THE COURT: Do you mean the Rams or the Raiders?

MR. MYERS: The moving of the Raiders and the past and previous move of the Rams and all sorts of things indicating alleged problems in between.

But we there saw jurors, some of them tormented by the press, others delighted in accusing fellow jurors of misconduct in the course of that particular trial.

I don't think that's appropriate, and it certainly isn't beneficial either to the People or to the defendant in a case such as this. The balancing, it seems to me, of the First Amendment right to a free press and the right of a defendant to a fair trial has to weigh, I think in this instance, in favor of the defendant. Impairment of the jury selection process by the mere presence of the press would, I [8] am sure, occur, would prevent us from having a fair trial, and in this case, as we have now recently removed publications which are the subject of further motions before your Honor this morning.

In this case, especially that kind of presence of a member of the press, will, I think, curtail the ability of both counsel to try and assure even each of the separate parties to this action a fair trial, given a political climate, if you will, in this country of people justifiably concerned about crime. I think it would be very difficult for a juror who felt that he or she could be fair and hold to the presumption of innocence would not be over-ready to impose the penalty of death in a case such as this. It would expose that person to far too much danger in terms of their later relationships with perhaps friends and associates. The outside world in general.

Obviously, we therefore oppose the presence of the press during the jury selection process. It is obvious that once that process is completed, once there is a jury and once this trial has started, the public will be able to be present, members of the press will be able to be present, we will be able to undoubtedly comment upon the evidence that is adduced at the time of trial, perhaps the conduct of the attorneys, the rulings of the Court, whatever. The public is apparently going to want to know, or apparently be told it wants to know by the press and by the other media. I think very few people would be able to be selected as jurors in the presence of the kind of circumstances that the press can and occasionally [9] does involve itself in.

We are fortunate, I think, in our city of having a newspaper media that is generally a fair one, that rarely extends itself individually against criminal defendants or others that perhaps are targeted by it, but that does not mean that it will always be so. It does not mean that all of the other articles and stories that appear are accurate, because they are not. But they do not need to be present for jury selection. There is nothing the public needs to know about the intimate feelings of prospective jurors, although the defendant and

certainly the People's representative have that need to know what those innermost feelings may be.

Once a jury trial has started, and in fact, once we arrive at a point when it has concluded, then those inner feelings probably can be revealed to members of the press.

We deal with a very, very fragile process, it seems to me, one that has been subject to various, even kind of abuse that have led to serious problems in assuring defendants of having a fair trial.

The fact that we spend so much time in this, and I have, in this case, spent a good deal of time pointing out the difficulties of obtaining a fair jury, given the publicity on the pretrial basis which has already occurred in this case, that is, trying to have a jury that is insulated from the effect of what those jurors or prospective jurors have read and what opinions they formed and the like. All of that, I fear, would be destroyed by the fact that those people would not even, during the most intense sort of questioning, not in the mean [10] or attacking fashion, but under intense questioning as to what they really think and feel, that those people would be insulated from the news media at that time would be very wrong.

So we would submit, your Honor, that this Court should rule as the other judges of the Superior Court have ruled and obviously as they have been sustained on appeal by the petitioner, that despite the fact that the First Amendment exists, it is not necessary to open this trial to public scrutiny until there is, in fact, a trial and to leave the pretrial process of jury selection, as often with other pretrial motions, not subject to public scrutiny and view until these matters have been decided by the Court.

Thank you, your Honor.

THE COURT: Thank you, Mr. Myers.

Incidentally, have both counsel been provided with a copy of the motion of the Press?

MR. WARD: Your Honor, I am sorry, I failed to provide a copy to the District Attorney's Office.

MR. MYERS: I received my copy a few moments ago and the district attorney has now been provided with a copy.

MR. SPITZER: Just this moment, your Honor.

THE COURT: You may have some fees to pay to the clerk, I don't know, there may be some fees due if you wanted this filed.

MR. WARD: That's fine, your Honor, whatever is necessary. We also want a copy of the transcript, which I will give a copy of my card to the court reporter.

THE COURT: The motion is ordered filed subject to the [11] moving party making their peace with the clerk, if there is any peace to be made.

MR. WARD: Your Honor, that is fine. We would do that. If I could make one more point, I don't know whether the district attorney would want to address this or not, but I would have one remark in the way of closing.

THE COURT: All right. If the district attorney wants to go ahead and make some remarks, I am going to certainly give him the opportunity to present whatever he wants in regard to your motion.

MR. SPITZER: Well, your Honor, I have nothing really to present. As Mr. Ward first indicated in his remarks, perhaps this motion is somewhat presumptuous regarding what the procedure is going to be in this particular case. It's my understanding that we have not yet fully decided what that procedure will be and how it will be conducted.

THE COURT: We have not.

MR. SPITZER: The legal issue, I have not had an opportunity to research or resolve, obviously, the tenders on the question of whether or not jury selection is a pretrial matter or a part of the actual trial, and there is a distinction drawn by the United States Supreme Court in the Richmond Newspaper case, and then in the Gannit vs. DePasquale case, neither of which talk about the issues that are of concern here regarding jury selection.

I would just make one comment for the record, that it has been my observation in the last several trials I have had, that a portion of that trial, or the jury selection [12] in those trials has been a sequestration of individual jurors from not only other members of the venire, but also from the public as they discuss matters of personal concern to them. There is a very common question asked of jurors, whether or not they or any member of their family has ever been charged with a serious offense such as the defendant is currently charged with, or any serious offense or if they have ever been a victim of a violent or serious crime. And I know a number of judges in this court that I have tried cases in front of recently, although not your Honor, have insisted that the continuation of that line of questioning, after there is an affirmative response, be conducted in private, wherein people can explain in detail what their own personal lives have taught them about the case.

Therefore, I see this, as I say, not an uncommon kind of experience in the course of a criminal trial. I find it curious that it's only been addressed in a case such as this.

But I would submit the matter, your Honor.

THE COURT: All right. Mr. Ward?

MR. WARD: If I may say, as a technical matter, the commencement of the trial can we say is the date that the People file a complaint and the appellate cases have held

that the trial commences with the selection of the jury and that it was an integral part of the trial itself.

Further, I didn't mean to indicate that simply because a process could be boring and uninteresting, that it is necessarily relegated therefore to an unprotected portion [13] of the proceedings. We think on the contrary, that it is a most important part of the proceedings. As is the case of most trials, they are uninteresting and not covered, but occasionally the public has the right to be informed. I reemphasize that I don't stand here representing a newspaper or newspapers or the media. We stand here representing the public in a need when all of the people cannot attend a trial, just through the press and the other media that they must get their right to attend and get word of what has transpired, and it is the public's right that is at issue, and if the Court has not made a decision as to how the questioning of the prospective jurors is to be handled, I am delighted, because I hope then that the Court can take this into consideration. And I know Judge Matheney in Indio, or I am informed that Judge Matheney in Indio has sequestered the venire persons one from the other, but did not close the proceedings to the public, and that, in our view, is the only way that it can be handled in the light of *Hovey* and in the light of the right of the public to know.

You know, you talk about the public trial and what Mr. Myers' remarks are, they sound good, but to me, I am really worried about those remarks, because if you look at the instance and say that the people who are prospective jurors have the right not to have their views and their feelings aired in public, the same argument could be made regarding witnesses and regarding defendants. You either believe in the right of the public to attend trials and the free and open process of the search for the truth, or you don't believe in it. And the [14] minute you start making exceptions and

saying, well, you have this right where people's feelings are involved, you break down the entire process. The great need for openness in the pursuit of the truth is the important issue here, and long ago, hundreds of years ago we came to believe that subject to public scrutiny, people appearing in this almost sacred place of a courtroom, the truth was found out through openness and through the rights of everyone to attend and hear what was said, and if you erode that, we are greatly afraid of the result.

Now, we have had this unusual situation where the Chief Justice and with the Supreme Court of this state saying that qualifications is different in the way you ask questions, and suddenly this gives an opening for an erosion of what I feel is a very important right that we ask the Court not to do. And that's the end of our position, your Honor.

THE COURT: Thank you, Mr. Ward.

MR. MYERS: If I may make one brief response, your Honor?

THE COURT: All right.

MR. MYERS: What we perceive as happening in the question for openness is itself an erosion of the very thing that it is to be opened. That is, by opening up to the public scrutiny and particularly the scrutiny of the media which supposedly stands as a middleman or a conduit of "truth", by opening up that process, the process of selection, the process of obtaining true information as to the feelings of prospective jurors absolutely becomes, itself, perverted and eroded. That is why, when persons of government wish to advise the public of something, or test a theory, they quote "off the record" or [15] become "unnamed sources." That is why people do not want to be open to public scrutiny in this kind of situation. The communication media themselves

are well aware of the reluctance of persons to divulge their innermost thoughts, to be "on the record."

On the other hand, at certain times and under certain circumstances, and yet the needs of a defendant in a case such as this and, in fact, in this case are that these people not feel that they are "on the record" to anyone other than the judge, the counsel, the defendant and their own consciences. By opening up the process of selection and interview questioning in a private place, in what Mr. Ward correctly terms a sacred place, we destroy the very thing that supposedly is being reported up and is supposedly being preserved. The public right to know is, of course, very important, but the defendant's right to a fair trial where his life is at stake is, I think, more important. It is not easy for the courts to balance those rights, but I don't think there is any serious question as to which way the balance has to tip. The theory of the public's right to know what is happening in a criminal case is founded basically upon the abuse of soverign power that allows the State to prosecute persons in circumstances where the prosecution ought not to have occurred. And thus prevent public comment and public knowledge of abuse by the soverign himself. That is the foundation of the First Amendment right as it applies to criminal trials.

Unfortunately we live in a time when that is not so much the problem as the problem of preventing public [16] knowledge, public discourse, public indication of facts and circumstances surrounding the criminal trial, and public review of the innermost feelings of potential jurors from having those kinds of things prevent the defendant from having his opportunity to receive justice and to have a fair and impartial jury. As it is, our position again that despite the fact that there is a First Amendment and speaking as one who is another former member of the American Civil Liberties

Union, a founder of one chapter, which Mr. Spitzer undoubtedly joined while in law school, nevertheless, the case, given the needs of my client to a fair and impartial trial, that we cannot allow the process of jury selection to be opened up to public scrutiny.

Whatever happens during a trial, when there is the ability of the public to attend, whatever happens after the trial when jurors may or may not be interviewed as they see fit, that is something else. The jurors can, at that time, say, yes, I will tell you how I feel about this or how I feel about the case, or they can say, go away. But if the process is opened up where they have no choice but to sit and tell how they feel, and cannot, themselves, indicate to the newspaper, "Please go away, I don't want my neighbors to know how I feel about this, I don't want to admit to a newspaper reporter that I have feelings of racial prejudice that I can't put out of my mind through no fault of my own, or simply through upbringing, I don't want the newspaper to know that I don't think that this is the kind of crime that justifies the imposition of the death penalty when I have been through two wars and have seen so many more people killed under so many [17] different circumstances." Those are feelings that are private, they only become somewhat public or semi-public, and they only become relevant when a person, by mere chance, is brought before this Court with the possibility of serving as a prospective juror.

For that reason, in addition to the others expressed, that is, that the persons interviewed by us in this court would have no ability to themselves say to a representative of the media, "Go away." I feel we should continue the policy of this Court with regard to the sequestration of venire men and women, not only from each other, but from at this point in the trial, the world at large. We fear oftentimes it is the standard instruction that a judge gives to the jury at each

phase of the trial, whether it is a recess or an adjournment, they are not to talk about the case to anyone, they are not to form any opinion, they are not to do that for a very particular reason so it doesn't influence their own decision-making process. And yet, if we were to allow jury selection to occur under the circumstances suggested by Mr. Ward, we would already be in violation of that injunction of the Court.

So for all of these reasons, we would very much oppose the motion of the Press-Enterprise, whether it stands to benefit itself, whether it stands a representative of only itself, or whether it stands as a representative of the public at large.

Thank you.

THE COURT: My inclination would be, well, number one, [18] I think Mr. Brown is entitled to a fair trial, and we must do our utmost to see that he has a fair trial. The public's right to know should be respected and permitted so far as possible consistent with Mr. Brown's right to a fair trial. In this regard, I believe we need to decide how we are going to proceed.

With regard to general voir dire and with regard to the special voir dire which relates to the question of individual jurors' feelings with regard to the death penalty, my first inclination is that we should proceed with, number one, bring in a panel of about 50 jurors, proceed with excusing any and all jurors consistent with counsel's pleasure, who will not be able to serve or feel they will not be able to serve due to the time estimates that may be involved in this trial.

Thereafter I would be inclined to keep those that are able to serve present and to proceed with general voir dire. My inclination also would be to permit the public to be, or news

media representatives, to be present at such general voir dire. And the reason for this is because there will be questions by myself and questions by counsel that we would like all of the members of the panel to hear so that we don't have to repeat them individually.

And once the general procedure is completed as to that panel, then I would propose to have drawn in order by putting all the names of those that are eligible to serve in the jury selection box and put it in there and draw them out in an order so that thereafter we could keep the individual [19] voir dire with regard to the death penalty qualifications, so-called, and by calling them as we need them and letting them go about their usual ordinary affairs in the meantime. And I will hear from counsel as to your pleasure.

MR. MYERS: Mr. Spitzer is looking at me, your Honor, so perhaps I will begin.

The Court should have before it a document entitled "Motions Re Jury Selection and For Increase in the Number of Peremptory Challenges," which addresses, to a very brief extent, this particular portion —

THE COURT: I do have such before me.

MR. MYERS: — of the problem. Essentially we ask in that motion that the jury selection process, that is, the considerations dealing with the death penalty itself, be placed at a very minimal level on the prosecution because of the feelings toward the "death qualifications of jurors" that are present in the *Hovey* case. Essentially our position in that regard is that by going into great detail about persons who feel that while they have great reservations about the penalty itself, nevertheless they could be fair and impartial on the issue of guilt and innocence. But if the prosecutor is allowed to go into great detail in that regard, that he will then begin, which we also seek to limit, to systematically

exclude persons of a recognizable class, that is, people who can be fair and impartial on the issue of guilt, but have strong reservations or simply say they could not impose the death penalty under any circumstances. So we seek that limitation.

[20] As far as the Court's suggestion, that is, to have persons en masse time qualified, obviously I think that's very appropriate rather than having people wait about perhaps for many days or even weeks only to tell us that they don't have the time to be present for more days or weeks that the case may require. The difficulty of having any further voie dire and particularly in any further voir dire on that to public review is that while we might gain in some information from people who can remember questions and while the Court and counsel would not therefore have to repeat, perhaps a number of general questions, nevertheless, what we sacrifice in efficiency, perhaps we gain in having people able to tell us, not only there what we argue ought to be just minimal views or feelings about the death penalty, but the deeper feelings about issues in the case which are in themselves, given the nature of this case, very much an emotional question.

The other point that I would have is that if the public, through the newspapers and the other media, are permitted to be present during the voir dire of a "general nature," which may or may not, depending upon certain other motions, include the actual demonstration of certain items of evidence in the case and inquire as to feelings about them, namely, some, one that comes to mind immediately, is some rather terrifying, upsetting photographs to which I think counsel are both going to have to inquire depending on what the Court rules may or may not be used, that there will be deep feelings expressed as to the nature of the crime, there will be deep feelings expressed as to the locality. I had not

mentioned [21] this earlier, but one of the reasons for the motion for change of venue before your Honor in this case which we have had word from the Court of Appeal today which was, in fact, denied, in that form was not only that there was extensive pretrial publicity that referred by its more or less nature, as a city, as a geographic entity unto itself of the citizens that are uniquely aware of what is happening and uniquely involved in their feelings about criminal charges of conduct that occurs within this particular community. My feeling is therefore that having those people able to be subject to public scrutiny on their views in areas in the case not involving the death penalty, but nevertheless still the subject of a good deal of emotion and concern of those interviewed people, and the public, that that would again act as a damper or render it very difficult to get the true feeling of people about the aspect of the situation.

So that we would ask that jury selection, so far as time qualifications is concerned, be conducted in the manner in which your Honor has suggested. But that all of the rest of the jury selection process, all of the rest of voir dire be conducted privately.

I think, finally, that if we were to allow private voir dire only on the question of the death penalty and feelings about that penalty, I think, and yet have open to the public the remainder of the voir dire, we would subject persons to a good deal of scrutiny and, in effect, in terms of the exercise of challenges for cause or peremptory challenges that might be granted by the Court, that there would be a good [22] deal of public concern as to why did the district attorney and the Court excuse Juror No. 3 or why did the defense attorney and the Court happen to excuse Juror No. 5, Mrs. Jones?

Under those circumstances, I think there would be a good deal of speculation about what went on in the private voir

dire and the mere existence of that kind of speculation would, I think, cause there to be an interference with the willingness of jurors to give us their true feelings about any of these items of concern to us in this case.

So that we would object to any part of the general voir dire other than time qualifications of the jurors being open to the public in this particular case.

The further portions of the document before the Court deal with the necessity, and we believe, for an increase in the number of peremptory challenges occurs from the denial, at least to date, of our motion for change of venue and our belief that the reasons prompting that motion require us to seek a greater number of peremptory challenges in this matter.

As I had pointed out to the Court at the time the change of venue was first heard and tried to emphasize to the Court of Appeal, the fact that our survey indicates so much knowledge of the facts of this case on the part of people in the City of Riverside, from which the great bulk of venire will be selected, almost forces us, if we are correct in our assumption of what that means as far as people's true ability to be fair and impartial, almost forces us to exercise a peremptory challenge for any juror who is familiar with the articles or who has even read the articles in our local paper [23] that were the subject of the previous motion.

And, of course, the renewed motion by reason of the publication this past Saturday, the subject matter of the article about not only the case and its facts, but about Mr. Spitzer himself, so that's our view on the press itself.

If there were an area in which the Court might feel that the case should be extradited, it might very well be that a questionnaire could be quickly devised that would allow us basic information about these jurors such as their general

area of residence, their occupation, the occupation of their spouse, the number of children and that kind of data that we traditionally ask, and perhaps we can have those in a sense in written form for each of the jurors. It would give them something to do while they were waiting, if nothing else. And we can complete further inquiry that could very well save us a good deal of time, but beyond that, we would object to any opening of the voir dire in the manner the Court has suggested.

THE COURT: We will hear from you, Mr. Spitzer.

MR. SPITZER: Thank you, your Honor.

Does the Court wish me to address counsel's motion as well as the Court's proposal on procedure?

THE COURT: Yes, please.

MR. SPITZER: First, with respect to the procedure, your Honor, I don't know how many jurors are going to winnowed out of the original 50 simply because they can't afford to be away from work, or home, or other business, for the month or so that this case will take to try once the actual evidence begins to be presented.

[24] I would respectfully urge the Court to bring over, for time qualifications, more than 50. Maybe somewhere in the neighborhood of a hundred individuals, and from experience in the —

THE COURT: Excuse me. In that regard my intention for bringing over 50, and going through the time qualifications situation, keep whoever are available or could serve around, and bring over another 50 and go through the time qualifications. We would have a hundred called, and I would propose to try to go through that entire hundred and winnow out those that would be able to serve.

MR. SPITZER: That sounds like a reasonable approach, your Honor. It provides that from the hundred we can get a reasonable number of people who can serve.

With respect to the general voir dire of jurors, my understanding was that the Court indicated that that would be public and we would concur with that proposal, first of all, because the number of questions regarding simply the procedure, things like the presumption of innocence, the burden of proof, a number of aspects of the trial itself concerning pretrial publicity and things of that sort, I think can be asked of jurors as a whole, and from that inquiry, particularly as they listen to the responses of other jurors as is the case in most criminal trials, they then can respond to a vast number of questions on their ability to fair and impartial.

With respect to the remainder, we would proceed with individual voir dire as suggested in the *Hovey* decision.

I'm afraid I don't understand what the Court's [25] position was as to whether or not that should be private, that is, in chambers away from the public, or simply away from other jurors. Did the Court have any thoughts on that?

THE COURT: Yes. It will not be in chambers. I intend to use the courtroom. It is simply whether anybody other than those involved would be permitted to be within the courtroom. My tentative thoughts are that we would conduct the general voir dire with the media having access and that we would conduct the individual voir dire with regard to death qualifications and any other special areas that counsel may feel some problem with regard to, questioning them in the presence of the others with the Court having reserved jurisdiction to permit something further than death qualifications is on the individual basis, but the individual inquiry would be in private and not subject to scrutiny by the press or anybody else not involved.

MR. SPITZER: Okay. With that understanding, I would move on to the points made by counsel in his motion. He apparently makes three points, the first one he is asking for not only the right of the people to exclude persons from the jury who indicate they can be fair on the subject of the possible guilt of the defendant, but who would not impose the death penalty under any circumstances. That, of course, is contrary to the law in this state, both statutory and case law. He is asking the Court to ignore Penal Code Section 1074, subsection h, which allows a challenge for cause on individuals who entertain such conscious opinions as would preclude his finding of the defendant guilty, in which case he must neither [26] be committed nor compelled to serve as a juror when the offense is punishable by death, as is the charge against Mr. Brown here. It's also contrary to the decision in the *Hovey* case.

Essentially what Mr. Myers appears to be asking this Court to do, is to overrule the decision in *Hovey*, which was — in which the Court was asked to exclude people because they would — because of their death qualified nature be more likely to vote guilty in the guilt phase. *Hovey* found unpersuasive the voluminous evidence from psychologists and other statisticians that were presented in that case. Which would support that proposition and we don't have similar evidence here, but again I'd ask the Court to follow the law here and not try to make any new grounds, as Counsel seems to be suggesting.

Next he is asking for an order preventing the prosecution from questioning the potential jurors about their attitudes about the death penalty beyond the minimal inquiry that very fair men can be fair and impartial in determining his guilt or innocence. Exactly how he would prescribe the questioning is not clear, but I would suggest to the Court that that kind of prescription is improper under the Supreme

Court's recent decision in *People vs. Williams*, which Counsel alluded to earlier.

In the *Williams* case, the Supreme Court, pointed out for the Court's benefit, that is at 29 Cal 3d 392, the Supreme Court in that case indicated, your Honor, that the voir dire process is a significant one, not only insofar as it establishes grounds for cause, but also insofar as it [27] provides counsel with valuable information with which they can subsequently make peremptory challenges. To preclude the prosecution from asking questions about individual's attitudes as to the death penalty and other issues of concern in this particular case, would, I would suggest to the Court, prevent the prosecution from obtaining the same kind of information that presumably the defendant would be able to obtain concerning their attitudes, and thus inhibit the People's right to a fair trial in this case. It would be contrary, I would suggest, to the Supreme Court decision in *Williams*, and again unprecedented in the law in this State.

Again, Counsel seems to be asking this Court to break new ground, which is uncalled for here.

Finally, he is asking for an order granting the defendant 100 peremptory challenges based on the assumption that there has been extensive pretrial publicity which has affected the jurors. At this point in time, I am not certain that the record justifies that order, either. First of all, I would point out that the Penal Code does make provisions for additional peremptory challenges in a death penalty case such as we have here. Under 1070 of the Penal Code, the defendant is entitled to 26 peremptory challenges as are the People. That's 16 more than in a normal criminal trial. That the sample voir dire that we did approximately a month and a half or two months ago, the 25 jurors now indicate that the individuals have been substantial prejudiced by the pretrial publicity. I think of the 25 people who were interviewed

at length, only three individuals indicated that they had been so [28] prejudiced and indicated it very early on to the extent that they would not be allowed to sit by reason of cause, and there would be no need to exercise peremptory challenges.

And the significant number of jurors who indicated that they had become aware of the case through the press were skeptical of the information that they had received in the press and were hesitant, if not downright unwilling to try to prejudge the case based on the fragmentary and somewhat inaccurate reports they had read in the newspapers or heard on television.

At this point in time, absent a clear showing of substantial prejudice to the defendant, I see no legal ground to grant his request for this increased number of peremptory challenges.

With those remarks, People would submit it.

THE COURT: Thank you. I will hear any closing argument.

MR. MYERS: Yes, your Honor.

In case Mr. — in case the district attorney — well, strike that.

The legal basis for the motions that we have made in this matter, your Honor, is essentially a constitutional one and I think in terms of determining that a class of persons that can A, be fair and impartial on the question of guilt and innocence, but B, object to and would not impose the death penalty is such that we feel that is a cognizable group and essentially the authority that did not allow such a cognizable group to be excluded from a jury is provided by the United States Constitution on the Sixth Amendment, and also Article I, [29] Section 16 of the Constitution of our state.

There are discussions in various cases dealing with the exclusion of, quote, "cognizable groups," and I will refer the Court to the opinion is *Rubio vs. Superior Court* at 24 Cal. 3d 93 and 97, a 1979 case which establishes that there does exist the constitutional right not to have cognizable groups excluded. That is the most recent discussion of that issue, of which Counsel is aware, in our state and Justice Mosk apparently in that case requires what is called the two-prong test.

That is, number one, you determine that a group is a cognizable group if the members of that group share a common perspective. The common perspective here that we are talking about is the ability to be fair and impartial. But essentially on the application by that particular individual or group of individuals of the death penalty.

The second prong of that particular test is whether or not Justice Mosk indicates there is an alternative to having that group or members of that group possibly present on a jury. That is, is there an alternative to excluding those persons? I believe that is the difficulty that as Judge Hennigan in a case still being tried in San Diego County had to wrestle with and is what prompted that judge to essentially come up with a two-tier or two-jury system in the case, allowing such persons to sit on the guilt phase of the trial, but apparently excluding them from serving on the penalty phase of the trial.

In order to be consistent, of course, with the [30] defense position of this matter, we would contend that even excluding some persons from the penalty phase of the trial would be improper, given the nature of the exclusion of that cognizable group, thus preventing the jury from being a cross-section of the views of the community and at least those are the legal bases, your Honor, for our motion insofar

as we seek to limit questioning and to limit systematic exclusion of such persons.

I think both counsel are aware of the *Williams* decision which allows, in the ordinary case, both criminal and civil, questioning to be fairly detailed in order to permit the exercise of peremptory challenges, and the Court may well say that my position in this regard is somewhat inconsistent, in that we talk about the need for a full inquiry of the jurors and in all regular matters, yet at the same time to restrict inquiry in what may be an ultimate issue in this case at some time in the future.

Nevertheless, and regardless of the fact that the Court may perceive that as being an inconsistent position, that is our position and that is the motion that we make.

So far as an increase in the amount of jurors, I think it is simply obvious that the number of jurors that will be present who come from the City of Riverside and who have been exposed to the publicity in this case, against whom we would feel a peremptory challenge might certainly be necessary, is going to be far in excess of the number, that is, 26 authorized by Section 1070 of the Penal Code and even though it may appear that 26 is 13 more than the standard number or [31] 16 more than the standard number, and 13 more than the number in other similar felony cases, that is simply the charge of murder where I believe 13 peremptories are allowed.

Nevertheless, I think that that number is too few if the Court continues with its ruling that the matter ought not to be moved from this venue.

Thank you.

THE COURT: Thank you. The motion for an order limiting the right of the People with regard to jury selection is denied. The People are subject to the Appellate Court

decisions with regard to that, and I will make no further order than that they, of course, will be subject to complying with such positions as have been set forth. An order limiting the prospective questions to the jury is denied. The People may proceed with such questions as they deem appropriate.

For an order granting 100 peremptory challenges, it is denied as premature without prejudice. If additional peremptory challenges may be necessary, the Court will reserve jurisdiction to permit such if it appears appropriate.

I am going to take a 10-minute recess, or whatever is left between now and 11:15 and at that time we will hear the motion for discovery of any data in possession of the district attorney regarding prospective evidence, motion to prevent trial on issue of special circumstances, pretrial motion to exclude photographs from evidence. We will at least take these up when we resume at 11:15.

MR. MYERS: Thank you, your Honor. I think with respect to the motion as to discovery and the motion in limine [32] regarding the prospective evidence, chiefly the photographs, I think the district attorney and myself are in conformity and can advise the Court that we have essential agreement on those motions.

THE COURT: Very good. Thank you.

(Whereupon, court recessed at 11:08 a.m.)

(A brief recess.)

THE COURT: Okay, we will proceed as to the motion for discovery of any data in possession of the district attorney regarding the prospective jurors.

MR. SPITZER: Your Honor, I have discussed with Mr. Myers, there is very little information that the District Attorney's Office maintains regarding prospective jurors other than if they have previously sat on this poll, of their names, and if they have sat, the kind of case it was and if there

was a verdict, what the verdict was. I indicated to him that I would have no objection to providing him with that information.

I have read the *Murtashaw* case, that is, we would have no objection to that.

THE COURT: Okay, the motion is granted, such information as the District Attorney may have regarding any prospective jurors will be made available to the defense.

The motion to exclude photographs, what is the status on that at this time?

MR. SPITZER: Your Honor, there is, as is customary in these kinds of cases, a substantial number of photographs that were taken during the course of the investigation, a number of which the People will seek to introduce to illustrate certain. . . .

Reporter's Transcript.

In the Superior Court of the State of California, in and for the County of Riverside.

The People of the State of California, Plaintiff, vs. Albert Greenwood Brown, Jr., Defendant. No. CR-18107.

VOLUME 30, Pages 3966 to 4045.

Before THE HONORABLE J. WILLIAM MORTLAND, Judge. Department V, December 30, 1981.

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[3966] PROCEEDINGS OF WEDNESDAY, DECEMBER 30, 1981, 9:47 AM

THE COURT: It is noted that Mr. Brown is present with his counsel, People's counsel is present and we are

here to take up any and all further pre-trial matters in regard to the matter of Mr. Brown, CR 18104.

We have a motion of the Press-Enterprise for release of the transcript of voir dire proceedings and court orders re preliminary evidentiary matters on Defendant Albert Greenwood Brown and if counsel is ready, we will take that up.

MR. WARD: Your Honor, if I may?

THE COURT: You may.

MR. WARD: James D. Ward of Thompson & Colegate representing the Press-Enterprise, your Honor.

We set out our position in our motion but very briefly we were here here once before asking that the voir dire proceedings remain open to the public and that motion was denied.

We anticipated at that time that we would, upon the conclusion of those voir dire proceedings, be receiving a transcript thereof which as a second or third best thing to us, at least it gives us some availability of the proceedings and now we have been informed, or we understand that it is the intention of the Court to continue to retain those transcripts and to refuse Press access to those transcripts.

Our position today simply is to request that those transcripts and any other earlier proceeding transcripts thereof having been made, be made available to the Press for the [3967] purpose of examination.

The procedure arises from another case in which we became involved and while we recognize that the Court of Appeal ruling on that was a non-published opinion, it is not binding. We also feel that it was a good procedure that was established whereby if the Court were to close certain proceedings after the commencement of the trial, the transcript of those proceedings could be made available.

We did not feel that that is really adequate to give us the freedom of the Press and to allow the public to exercise it's rights as we see it. But certainly it is something that we would respectfully request at this time that the Court make those transcripts available to us.

(NO OMISSIONS)

[3968] THE COURT: We will hear from Counsel on it.

I do know that in the Harven, et al case which is CRN 6940 there was an Appellate Decision 4 CIV 24896 and 24897 in which Petitions for Writ of Mandate were read and considered with opposition, and they indicated provided the trial court permits transcripts of the posed portions of the voir dire examination to be released to the Press and public when the public part of the trial begins and further provided the trial is open to the public in the time the first witness is sworn the trial court is acting within its discretion here. The petitions are denied without prejudice for application for further relief should these conditions be violated.

So we will hear from counsel with respect to this.

MR. MYERS: Very well, your Honor.

THE COURT: I am concerned if I am required to make them open to the public that I should do so.

Most of them are of little moment. There are a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individuals' situations are concerned.

MR. MYERS: Your Honor, Joseph Myers appearing for the defendant.

The first thing that I would request in line with this motion of the Press-Enterprise Company is that my letter to the Court dated some weeks ago be made a part of the file in this action.

That letter represents to a very great extent my views on the subject of the confidentiality and essentially the [3969] right to privacy of all persons that were brought to this Court under the duress of our court system and the jury commissioner and brought to this courtroom to answer questions. They had no choice in whether or not they would fulfill their obligation to act as jurors. They had no choice in terms of whether or not they would be required to answer the questions of counsel regarding their qualifications and fitness to serve as jurors in this case. They had no choice but to answer those questions and they were required, inasmuch as they were under oath to tell the truth.

For one thing, as I pointed out in my letter, if this is the motion of the Press-Enterprise to reach into the transcripts of this Court have hitherto been filled then I believe the parties to this motion would include each and every person who was questioned by Mr. Spitzer and myself in these proceedings and also questioned by the Court because it is their right of privacy, it is the personal details of their lives, their feelings about sex and religion and politics and race and this case itself that are being sought.

It is my feeling, therefore, that this motion cannot even be heard at this time because the parties to this motion are not only the defendant who engages in voir dire of jury and prospective jurors to preserve his rights to a fair trial, nor is it only the District Attorney who seeks essentially the same thing, that is, a determination of who should and who should not sit on the jury, but the people who are most directly involved are, in fact, the people who we interviewed. And their rights to representation in this proceeding, it seems to me, [3970] are perhaps even paramount to those of the defendant and the prosecution.

I would say, first, that I don't believe in this case that there is a standing to have the motion heard at this time

without those persons being advised formally of the motion, or given the opportunity to be represented and, in fact, I believe that the Court can and should condition, if it chooses to hear this motion, any condition on the fact that notice and the provision of representation to those persons be provided by the Press-Enterprise Company.

It is the Press which seeks to go into their private lives in a situation where they had no choice but to answer questions, unlike their choice at the conclusion of this trial when a member of the Press might go to them and ask them about their lives and their feelings, and they could at that time comply and talk about the case or themselves, or choose not to and send the reporter packing.

So my feeling is that those people should be notified of this motion formally. They should be served with it, and they should be represented, and if they cannot afford representation then the Press should pay the cost of that representation.

Even though that is my suggestion, it is also my feeling that the fact that the motion might be served at this time could very well interfere with my client's right to a fair trial.

But, in any event, this motion should not be decided by this Court, it seems to me, or by any court without the people who are directly affected, that is, the prospective [3971] jurors and the actual jurors in this case being able to present their position.

In my letter and here and earlier times and during these proceedings, I have expressed the defense feeling about that, which is that these people are entitled to privacy, that, in fact, the voir dire is not the trial itself. It may be closed, and it may remain, it seems to me, closed.

I don't think the opinion of the Court of Appeal in the Harvin matter is binding on this Court obviously, but I don't even know if it's apposite to the questions before this Court. I don't know what order it was that Judge Hennigan originally made, whether the parties in that case consented to having the voir dire proceedings opened at some later time or released or unsealed. I simply am not aware of the issues that were before the Appellate Court in that case.

And if all parties in that situation had felt that they were not constrained to protect the privacy of the prospective jurors, then that is, indeed, a different case because that has been, I know, of great concern to me. It has been to the District Attorney, and I'm sure that it has been to the Court.

We had also in the course of these proceedings, not only by this form which is having each prospective juror interviewed singly as Hubby & Witherspoon require, but also in virtually direct assurance to the persons who were concerned that these proceedings were confidential.

And I can think of several of the people interviewed who are now on the jury who were concerned that what they were [3972] telling us about themselves was, in fact, confidential.

One woman I certainly recall said, "I couldn't say these things because there's a lady in the venire who knows my mother, and I would never want my mother to know about this situation.

And I'm sure the Court and counsel can recall numerous other incidents where very intimate details were presented.

There are things that we, Judge and two attorneys, may feel would not be particularly private to the persons that we interviewed, but again I think that that's their decision to make. If their feelings about religion, for example, which to all of us might same fairly innocuous or appropriate or

that there would be no harm caused by public review of those feelings, our feelings on that might be incorrect. We may have people who for one reason or other are very intense perhaps in their feelings that their religious opinions are their own business.

The same is true of politics which we inquired into. The same is true of sex. The same is true of their attitudes toward their husbands, wives, children, parents, their occupations and the like.

So our feeling is that the voir dire in this case was not open. It was not a part of the trial of this action. The trial will begin on Monday essentially when that jury is sworn, Mr. Spitzer makes his opening statement and perhaps a witness is sworn in this action. That is when certainly jeopardy will attach so far as my client is concerned. That is when the public will have a right unquestionably it seems to me to be in [3973] the courtroom listening to the evidence that is presented to the jury.

I can foresee possible motions during trial where the jury would be excluded and the public could be excluded as well.

(No Omissions)

[3974] Seven weeks or so is, in fact, confidential and should remain confidential in that although I am trying to do it in terms of the persons that we interviewed to present to the Court their rights, I believe that those people themselves, if the Court is to hear this motion or the Court is even inclined to grant it, that they have a right to be here to say, no, what I said was confidential. I thought it was confidential, I was assured it was confidential and I could never face my husband, wife, family, friends, whatever, if some of this information were to be public at this time.

And as I have indicated, these people had no right to tell us essentially I am not going to answer your questions. Although there were a few people, as I recall, who felt that they couldn't answer certain questions and there were some others who wondered why it was that we were asking them. But to now say that the press can rummage through the transcripts and find, perhaps, those things that are sensational about individuals obviously most of whom are not either jurors or alternate jurors in this case, would be completely inappropriate. It would be uncalled for and would surely be in violation of the constitutional right of privacy of these people.

When we learned that the press was interested in those transcripts, Mr. Spitzer having had a call and then I having received a call, Mr. Bowman said, well, what do you think would happen if we got to review the transcripts?

And I told him that it would be a field day for plaintiffs' lawyers in Riverside because that is unquestioned, [3975] at least in my mind, that the materials in those transcripts are not appropriate for public investigation and certainly not appropriate for publication and were they to be published, I think that in violation of privacy on the part of those prospective jurors at that time would cause, to say a multiplicity of actions would be understating, I think, the question.

However, in this proceeding I believe that the confidentiality of the voir dire can and should be maintained. I see no law that that confidential proceedings be opened, I know of no cases that indicate that it must be as the Press-Enterprise desires.

Secondly, if the Court feels that there is a question about that, both Mr. Spitzer and I have been handed the documents in support of the Press-Enterprise position only this morn-

ing, I would ask that we be given an opportunity to respond and even more that the persons that we interviewed, each and every one of them be given notice of this proceeding and the opportunity to be represented because it is their privacy that is sought to be invaded at this time and I just cannot imagine what public interest there is in the intimate details of lives of the jurors, the alternates and the persons that were excluded.

THE COURT: Now Mr. Spitzer, we will hear anything that you want to present.

MR. SPITZER: Thank you, Your Honor.

Your Honor, People in the form of the District Attorney's Office of this County would agree with the substance of the remarks made by Mr. Myers and the general thrust of his [3976] letter of December 16, 1981, to the effect that the Court's Order directing that the proceedings relating to the sequestered voir dire of the individual jurors remain sealed at least at this point in time.

I think one of the things that the Court has to recognize and I think the Court recognizes it and the attorneys recognize it, but perhaps the press does not, and that is that right now, particularly in this case and in cases that have been going on trial this year, the attorneys and the courts are operating under a set of rules which are, I believe, almost unique in this country and ones that have not existed in the law before.

There are a series of cases which the courts and counsel are aware beginning with the Hovey decision and then expanded again only this summer in the case of People vs. Williams, wherein the Supreme Court threw out a hundred years of case law dealing with the scope of questioning during the voir dire process.

Essentially, before this summer there was a limit to the kind of questions that attorneys could ask. They could only ask questions that related to challenges for cause. Now, under the decision in the Williams case, attorneys can ask any questions which might reasonably lead to an intelligent exercise of a peremptory challenge, a peremptory challenge being a challenge which needs no reason and rests solely within the discretion of the individual attorneys.

As a result of that, a large number of areas which were heretofore privileged and confidential and irrelevant in [3977] the examination of jurors suddenly were opened up to defense counsel and the Prosecution in the voir dire examination.

Issues of someone's religious faith, a part of it being of how that faith would relate to the issues in this case, suddenly were fair game. Issues of politics, how one voted, the secrecy of the ballotbox was suddenly opened up, perhaps.

In addition to that, large numbers of jurors, because of the particular nature of this case, chose to relate to us under either the implied or express promise of confidentiality, intimate details of their lives, which they thought might affect them in dealing with this kind of case.

We have a case here that is, I will suggest, substantially different than the kinds of cases that the Court and the Court of Appeals were confronted with in the case of People vs. Smith, Harven and Harven.

In that case, we are talking about a bank robbery and granted, the death penalty is involved, but the subject matter is basically a robbery and an escape and a shootout. All of which basically occurred in public view.

In this case, we are talking about a crime that did not really occur in public view, it occurred in the secrecy of an

orange grove without witnesses. One which involved not only the homicide and the killing of Susan Jordan, but also the sexual molestation of that young girl and the issues associated with that kind of attack.

As a result, counsel made some inquiry and, in fact, a number of jurors volunteered reports of incidents that had [3978] occurred in their lives which related to matters sexual. Problems in their marriages and divorces, problems associated with growing up and sexual experience. A number of the jurors related details of what they believe to be sexual assaults that they had suffered and as Mr. Myers pointed out, a number either they suffered or members of their family or friends suffered. And as Mr. Myers points out, some of the jurors indicated in the course of relating these details that they had not reported them to anyone else or they had not communicated these facts or incidents even to members of their own family. Children, parents and relatives.

There was, throughout the proceeding, Your Honor, I think by the Court's own words and actions, as well as the words and actions of defense counsel an implied promise of confidentiality regarding the subject matter of what was being discussed. Matters went to other areas in which the mental health history of certain jurors were discussed, histories of hospitalization or treatment by a psychiatrist, even a brief encounter with a psychiatrist was brought up, making it plain that there was the implied promise of confidentiality.

Now, a number of jurors, as I recall, at least three balked at a question that I would ask concerning how they voted on a particular issue in a particular election and at least three of the jurors said I thought we had a secret ballot in this country and, indeed, we do. And if this had been certainly a jury selection before this summer, that question would

probably have been subject to an objection by the Court and be disallowed.

[3979] The jurors have certain privileges, certain rights to privacy which they, in the course of their examination here were uninformed and unadvised of because they were promised confidentiality.

No one was here to represent their interests to say to the juror, wait a second, this could be made public at some later date. No one was here to assert any kind of privilege that might exist under the Evidence Code or under case law or that might exist.

They, essentially, were in the box defenseless in answering those question.

For all those reasons, the situation that exists in this courtroom is different than the one that existed prior to the summer of this year in the State of California and although I am not as well versed as, perhaps, Mr. Ward is on the state of the law in other states, I would suggest that at least in my information there are not any other jurisdictions which permit as wide-ranging an examination as is permitted in this state and as was permitted by this Court.

(NO OMISSIONS)

[3980] THE COURT: With respect to the decision in the Smith and Harven case, again I would agree with Mr. Myers concerning the applicability of that decision here, for I have spoken with the Deputy District Attorneys who have handled that case, Mr. Hanks and Mr. Ruddy, and they have indicated to me that the jurors were informed and the Court operated under the assumption that at the end of the proceedings the transcripts might be made available to the public. The issue concerning the sealing of the transcripts was not, to the best of my knowledge, believed or argued in the Court of Appeal.

And that fact alone, your Honor, I would suggest separates and distinguishes that case from the one we have here.

I have some — well, I suppose I would say lack of understanding or appreciation for the reason why the Press would want the kind of examination that was conducted in this courtroom. I don't know what issues they would find interesting outside of the, perhaps, purely prurient ones associated with the personal lives of the individuals, most of whom, as Mr. Myers said, had no choice in the matter. They were drafted. They received the letter from Mr. Mann, the Jury Commissioner, and had come down here and believed they had to answer all of the questions that we gave them.

It is interesting to me to note that the Press was not present except for the first day of jury selection, and during the extended examination of Mr. Myers that went over two days and the examination that I did which went over two days the Press and the person, Mr. Bowman, chose not to be present for those kind of questions which would normally be public.

[3981] It is possible, your Honor, I suppose for someone at sometime to go through that jury examination and excise out those insensitive portions, but certainly, as the Court can appreciate, we have something like 4,000 pages of transcript. And I have no idea when the trial is starting on Monday who would be able to do that and who would make that kind of judgment as to what was privileged and protected and where right to privacy existed and where one didn't.

The other thing I would note to the Court is something that I noted at the time that Mr. Ward laughed here, and that is that, although the voir dire and sequestration of the examinations that occurred in this case was more extensive

than in most cases, it is not entirely unusual. In my experience in this courthouse, if not in this courtroom, in virtually every felony case I have tried, and there have been dozens, I have not had a trial where a juror has indicated a reluctance to answer a question of a personal nature and then the Court has not taken that juror into Chambers and the questioning has gone on in Chambers in-camera.

Judge Schulte — I am not suggesting he is an example, which everyone should follow, but it is his regular practice in his courtroom to indicate with respect to certain questions that if jurors do have personal problems he tells them at the beginning that they should indicate that they wish to speak to the attorneys in Chambers, and that is an automatic process of the voir dire in that particular courtroom.

But certainly in every courtroom there are proceedings that occur in the course of a public trial where counsel ask to [3982] approach the Bench, where counsel ask to discuss a matter in-camera with the Judge. Those matters are handled at that time out of public view and examination and are, for all intents and purposes, secret.

I suppose that someone at some time could go back and examine after the case has gone up on appeal if a transcript was prepared those transcripts, but that, to the best of my knowledge, rarely occurs.

In summation, your Honor, we would ask that the Court's order regarding the sealing of the voir dire examination continue.

Now, Mr. Ward appears to make one other request, a release of all, quote heretofore suppressed court orders concerning evidentiary matters submitted to this Court for rulings by the People. I am not entirely certain what that is referring to, and he is not specific in his request.

There was a court order — well, there was a request by the defense for a sealing of the preliminary hearing transcripts and certain other matters relating to the arrest of the defendant, things of that sort. The defense made the motion, and the Court will recall the motion was denied, and the matter was taken up by the People before the Court of Appeal.

It would be the People's intention, your Honor, and it was the People's intention at that time to prevent public dissemination of the information contained in those proceedings and those documents in order to effectuate the selection of a fair and impartial jury in this County.

Once that jury is sworn next Monday and we begin the [3983] public trial, and jeopardy has attached, it would be the intention to move that the Court unseal all those documents. So the People would have no objection to the release of those public records.

However, we do object to the release of the records associated with the voir dire primarily because we concur with Mr. Myers that there is a right of privacy that belongs to those jurors which we cannot — that is, the District Attorney's office, cannot violate, and we cannot effectively represent those people in these proceedings.

With respect to his request for extended media coverage in the form of apparently a cameraman in the courtroom, we have no objection.

MR. WARD: May I close, your Honor?

THE COURT: Yes.

MR. MYERS: Let me make one statement for the record, and then Mr. Ward can take it, because I didn't turn my attention to that other part of the motion of the Press-Enterprise.

Just so that the Court is aware of the defense position, we would take a different view from Mr. Spitzer and the office of the District Attorney with regard to the evidentiary materials, the motions on suppression, the preliminary hearing transcript, and the like, because we feel that unsealing those items at this time, which may or may not include the evidence that is presented in the public trial, would be very adverse to the interest of my client and could prejudice the jury and alternate jurors in this matter.

[3984] Even though those people have assured us that they will avoid exposing themselves voluntarily to publicity, I can well imagine certain items, certain kinds of evidentiary materials, that this Court would not have itself ruled on that would, by this process of unsealing, be exposed to the public and perhaps published and then perhaps discussed so that one or more jurors might be exposed to them and not able to have that material screened from their view.

So our position would be that we would ask that those orders remain in effect and that those things that were previously sealed remain sealed, at least as far as the evidentiary material until the conclusion of the trial so that there's no danger of the jury, once it is sworn and once jeopardy does attach, committing some sort of misconduct and causing us to have to go into that point, a rather extremely hazardous and difficult road in terms of showing that such misconduct existed.

So far as the request that the Riverside Municipal Court have extended media coverage, I think that that is probably within the Court's discretion to grant so long as it does not interfere with the trial process itself.

THE COURT: Extended coverage?

MR. MYERS: Yes, sir.

THE COURT: I would require the written consent of the defendant and the written consent of the prosecution.

MR. MYERS: Well, let me —

THE COURT: According to the rule.

MR. MYERS: All right. Also, of course, as the Court [3985] is aware, this request was not served on me or Mr. Spitzer until the Court made copies of it for us this morning, and it is addressed to the wrong court, but I will discuss that with Mr. Brown and see what his views are. And if he chooses to provide a consent, we'll do that.

THE COURT: All right.

MR. WARD: May I close, your Honor.

THE COURT: Yes.

MR. WARD: Very briefly, regarding the request for extended coverage, and the Court is aware, I had no previous awareness of that. I had a conversation with the Court. That was done by my client independently, and I am not here particularly arguing that, although, of course, I uphold their position and would hope the Court would grant them the right under the law as the Court sees it.

As to the more important matter to which I have previously addressed myself, the matter of the right of the public to attend this trial, I feel we should get back to basics on that point, and with all due respect to the sincerity of both counsel, both of whom I respect, I think that there is something lacking here in perspective in what we are actually doing.

I do not represent a single newspaper who comes in and has some prurient interest in the transcript of a proceedings and wants to pry into the private lives of individuals. I do not represent a newspaper who simply wants a single transcript of a proceedings.

We may have an aggrandized view of our position, your [3986] Honor, but we believe we are standing for is the right to the public to access to trials. It is our belief that the public has a right to that access and that if they don't have it, that there is a very grave danger of a miscarriage of justice that will effect all of us, and the reason is very simple and it's apparent from what we see here today.

I am almost in the position of saying as little children say, "I told you so," because our position has been that the minute you close down the voir dire proceedings then you are putting yourself to the situation where from that point on, and if you follow the argument of counsel to its logical conclusion, never would the public know what took place in the selection of that jury, this jury who is going to sit here and make the decision in this case, the most important single part of this trial, because the people who are deciding the case have been selected and the prosecutor and the defense counsel now say that all of that is private and that the public should have no right to it.

(No Omissions.)

[3987] If you follow the logic of their reasoning, we might just as well lock that door and never allow people in here. Again, because witnesses are going to be called who are not represented by counsel, who have no choice but to answer the questions and who are asked questions that may be embarrassing to them that do not have counsel representing them are not in an adversary situation, Your Honor, and I submit, Your Honor, that if we logically extend the argument of counsel we are going to close the whole proceedings and I submit, Your Honor, that we are following a track that's going to get us in trouble, that's going to violate very basic rights.

If we believe in the system that we have adhered to for hundreds of years under our system of jurisprudence, that courtrooms are open and public places because in the open light of day with the scrutiny of the whole of the nation looking in at any proceedings at any given moment that that's when the truth comes out and that's when justice is secured.

If we basically believe in that we take away inch by inch the right of the people to have access to those proceedings. And I think that's precisely what's happening here. And in a sense, with all due respect to the sincerity of counsel, I am horrified at what I see here.

Now, one argument is interesting to me. I certainly cannot buy it and Mr. Myers arguing that there is some adverse proceedings for all jurors are in some adversary proceedings with us and they have to have counsel appear, as I say, all of the participants would have to have counsel and to participate in these proceedings. If, indeed, some promise was made to [3988] these jurors that this was totally private and it would never be revealed, then I submit, Your Honor, that an error occurred there and I respectfully submit that because I believe that it was implicit in what we originally sought in the openness of the voir dire proceedings that we would pursue it until such time as we got it.

Now, when — whether we got it at the end of the voir dire, at the start of testimony or at the end of the trial or whenever we got it, it was implicit that we wanted access, we believed that the people, the public, through the media of the press, have the right to access to those proceedings, and I would sorely regret if there was any promise, express or implied, that those jurors were able to answer questions in total secrecy, and I think that would be wrong.

I submit, Your Honor, that if we do this at this point, if our request for access is denied, that we are going to have an exceedingly difficult situation, as I say, I think it's a progressive type of thing where another step will be the closing of the testimony, for instance, on the rationale of the same arguments. And I think that we would see the ultimate breakdown of what we think is so important, which is the right to a free and public trial.

THE COURT: Thank you, Mr. Ward.

The letters of Mr. Myers dated December 16, 1981, is received, ordered filed and made a part of the record.

MR. WARD: Excuse me. I apologize for interrupting, since that has become a part of the record, would it be possible for me to procure a copy of that?

[3989] THE COURT: Yes.

MR. WARD: All right.

THE COURT: And the motion of the Press-Enterprise which has been received by the Court is received, ordered filed.

I don't know if we have any filing fee problems or not.

THE CLERK: I think we have overcome that, Your Honor.

THE COURT: Very good.

It's ordered filed and as part of the record.

The motion to conduct extended media coverage is received and ordered filed and as soon as the People have indicated they would consent and we will leave it up to them and hear what defendant decides after counsel has had an opportunity to interview him.

The defense motion in limine is received and ordered filed as of December the 28th, 1981, we will take up next. But on Mr. Ward's motion on behalf of the Press-Enterprise,

and incidentally the request for extended coverage I deem it to be a clerical error, that it is addressed to this Court and not the Municipal Court, it indicates that I am the Judge, and so I assume it simply was an oversight that it has the Municipal Court name on it.

The motions at this stage of the proceedings is denied without prejudice.

I agree with much of what the defense counsel and People's counsel have said and I also, regardless of the [3990] public's right to know, I also feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas that the right to privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think, should have some limitations and, so, at this stage, the motion to open up anything that's been ordered sealed, including, again, the individual sequestered voir dire proceedings is denied without prejudice.

MR. WARD: Thank you, Your Honor.

THE COURT: Thank you.

MR. MYERS: Thank you.

MR. SPITZER: Thank you, Your Honor.

THE COURT: We will take up, I will advise counsel of one thing that I presume we will probably have to take up when Mr. Reiss is available, Alternate Number 2, Mr. Brian Reiss called in several days ago, last week sometime. He has a new job that they want him to commence on January the 18th so he is requesting to be excused.

I have just made a note of it and we will take it up when he is available and act on it as might be appropriate.

Now, we will proceed to the motion in limine.

The motion in limine seems to relate to all proffered testimony of the Department of Justice, to-wit, Faye Springer, regarding comparison of footprints. Testimony of the Department of Justice, including Faye Springer, relating to circumstantial evidence of blood or semen types. . . .

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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

PRESS-ENTERPRISE COMPANY, a California Corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

PRESS-ENTERPRISE COMPANY, a California Corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Two.

REASONS FOR DENYING THE WRIT.

I.

THE QUESTIONS PRESENTED BY PETITIONER WERE RECENTLY CONSIDERED BY THIS COURT; NOTHING NEW IS PRESENTED BY PETITIONER TO JUSTIFY THE GRANTING OF THIS WRIT.

In the October 1981 Term of this Court, Petitioner, together with Copley-Press, Inc. petitioned this Court for a Writ of Certiorari in the case of *Press Enterprise Company,*

et al. v. Superior Court, Case No. 81-1022. That Petition involved the issue of the closure of the jury *voir dire* in a criminal case with death-penalty potential. That Petition, as well as a subsequent Petition for Rehearing, were denied.

Although the Petition in Case No. 81-1022 dealt only with the issue of the closure of the jury *voir dire*, the Petition for Rehearing raised and argued the issue of the sealing of the *voir dire* transcript and with specific reference to the case underlying the instant Petition, that is, *People v. Albert Greenwood Brown*, Riverside Superior Court, Case No. CR 18104. (See Petition for Rehearing From Order Denying Writ of Certiorari, Case No. 81-1022, pages 2, 3 and 4).

A fair reading of the instant Petition reveals nothing not already advanced and argued in the previous case except for the reference to the intervening decision in *Globe Newspaper Co. v. Superior Court* (1982) .... U.S. ...., 73 L. Ed. 2d 248, 102 S. Ct. 2613 and the bare and unsubstantiated claim that Petitioner's counsel has conducted an "informal survey" in Los Angeles and Orange Counties which indicates to Petitioner's counsel that the death-qualifying phase in each capital case is "automatically" closed to the public and the press. Whatever may or may not be the practice in other counties, such circumstances hardly justify the granting of the Petition in the instant case. Moreover, the closure of the jury *voir dire* in *People v. Brown* was not in any sense automatic. It was done only after the trial court had applied the three-pronged standard set forth in *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814. Similarly, the sealing of the *voir dire* transcript was done only after two public hearings were held on the matter, one during the trial and one after its conclusion.

In short, Petitioner has already presented to this Court in a prior Petition the very case and questions raised in this Petition. Nothing new has been presented to justify the granting of this Petition and thus it should be denied.

II.

ALL OF THE VENIREPERSONS SHOULD BE NAMED AS REAL PARTIES IN INTEREST TO THIS PETITION.

At no time, either in the motions brought in the trial court or in any of the petitions brought in the appellate courts, has Petitioner named as real parties in interest the venirepersons who were called and examined in *People v. Brown*.

All of the venirepersons who were examined on *voir dire* appeared in court as part of their civic duty. All were sworn to answer truthfully the questions put to them by the trial court and counsel for the parties, and the range of questions was certainly potentially broad since under *People v. Williams* (1981) 29 Cal. 3d 392, 174 Cal. Rptr. 317, 628 P.2d 869, voir dire examination in criminal cases is allowed to extend as far as trial counsel's discretion may wish to take it.

However, although venirepersons are obligated to be forthright and complete in their responses, it should not mean that they are forced to leave their rights at the door of the courthouse. The venirepersons also have competing rights which should be raised. The proper parties to raise them are the venirepersons and thus, a Petition, such as the instant one, which excludes them, should not be considered.

III.

THE RESPONDENT COURT MAY, IN APPROPRIATE CIRCUMSTANCES, CLOSE JURY VOIR DIRE AND TRANSCRIPTS THEREOF TO THE PUBLIC.

Petitioner concedes that under *Richmond* and *Globe*, its First Amendment right of access to criminal trials is not absolute. Both of those cases set forth certain standards

which must be considered before closure can be permitted, standards which were considered by the trial court in the instant case.

A. The Respondent Court Considered and Satisfied the Test of *Richmond*.

The *Richmond* case sets forth a three-pronged standard to be satisfied by the trial court in ruling on whether to close a trial to the public, as follows:

(1) That there are findings on the record to support such closure;

(2) That alternative solutions were considered; and

(3) That the trial court recognized the right under the Constitution for the public and the press to attend the trial.

In the present case, these standards were met.

On October 19, 1981, Petitioner made an oral and written motion in the trial court to allow public access to the jury *voir dire*. Petitioner requested release of the jury *voir dire* transcript by motion on December 30, 1981, and again by an ex parte application on February 23, 1982. All of these motions were fully briefed and argued in open court.

The first standard was clearly met as the Respondent Court made specific findings on the record to support closure of the jury *voir dire* and the order not to release the transcripts. These are seen not only in the transcript of the hearings but also in the Minute Order of February 23, 1982.

The second standard was also satisfied. Although Petitioner failed to suggest any alternative to closure, the Respondent Court did employ an alternative to total closure by allowing public access to the general portion of the jury *voir dire*, and did have a transcript of the *voir dire* prepared so that it could be released if and when it was appropriate to do so.

The third standard was also clearly met. Petitioner's motions in the trial court discussed at length the public's First Amendment right of access to all phases of the trial including jury *voir dire*. The fact that the public was allowed access to the general portion of the jury *voir dire* evidences that the Respondent Court recognized the rights of the public and the press of access.

Finally, it should be noted that although the *Globe* decision postdates the hearings had in the instant case, it is clear from the record that the closure of the jury *voir dire* as to selected issues and the decision not to release the transcripts at the present time were not made in any arbitrary or mandatory fashion. The decisions were made only after the rights of the respective parties in interest, including the public and the press, were fully considered. Clearly, based on the specific facts of this case the three-pronged standard of *Richmond* was clearly satisfied.

B. The Decision in This Case Complies With the Rationale of Hovey in Helping to Ensure a Fair Trial.

The philosophy of *Hovey v. Superior Court* (1980) 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P. 2d 1301, is that "trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death." (*Hovey*, 28 Cal. 3d at p. 81)

Hovey reaffirms the criminal defendant's right to a fair trial, in part by the sequestration of the jury, and in part by permitting potential jurors to be examined individually and out of the presence of other jurors on death-qualifying issues. The rationale underlying *Hovey* is that: (1) potential jurors will be more candid in their responses to *voir dire* examination if they are examined out of the presence of

other jurors; and (2) potential jurors tend to be influenced by the responses and comments of other potential jurors.

The decisions of the trial court in *People v. Brown* attempt to balance the competing interests of the First and Sixth Amendments. As long as it is recognized that in appropriate cases the criminal defendant's Sixth Amendment right to a fair trial, especially in a death-penalty potential case, can outweigh the First Amendment rights of the public and the press, then the decisions made by the Respondent Court in the instant case are certainly proper.

It is important to note the fact that following the conclusion of the criminal trial, the jurors were free to be interviewed by the press. Furthermore, although Petitioner contends that the *voir dire* transcript was sealed "permanently" there is no evidence that the transcript could not or will not be released at a later, appropriate time.

Conclusion.

"Petitioner is hopeful that review by this Court will clarify the rights of the public to attend criminal trials . . ." (Petition, p. 18). In fact, this Court has already clarified those rights in *Richmond*.

It must also be considered that the instant case involves a *Richmond*-type situation, that is, a discretionary act by the Respondent Court as opposed to a state statute mandating closure as in *Globe*. To be sure, in the latter case, a particular complained-of statute might dictate review, but as to discretionary closures, this Court has previously set forth a clear standard requiring no refinement.

For this reason and the foregoing ones and each of them, Respondent prays that the Petition be denied.

Respectfully submitted,

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF AMICUS CURIAE OF CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION.

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BRIEF AMICUS CURIAE OF CALIFORNIA NEWSPAPER PUBLISHERS ASSOCIATION.

Preliminary Statement.

California Newspaper Publisher Association (CNPA) submits this Brief Amicus Curiae in support of petitioner, Press-Enterprise Company. All parties to this action have given CNPA written consent to the filing of this Brief. Copies of such consents have been filed with the Clerk of this Court.

Interest of the Amicus.

CNPA is a non-profit organization duly organized under the laws of the State of California. Its members include over 400 daily and weekly newspapers, approximately 100 student newspapers and the majority of newspaper publishers in California.

Since the early 1930's, CNPA has been active in promoting and advancing the general interest and concerns of newspapers and newspaper publishers in California and further has actively encouraged improvement of the manner in which the journalism profession fulfills its obligation to the public to provide complete and accurate reports of executive, legislative and judicial affairs.

CNPA has followed, with growing concern, California trial courts' interpretation and application of the mandate prescribed in the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 168 Cal. Rptr. 128, 616 P.2d 1301 (1980). CNPA is aware this issue has been previously brought to this Court for review. In the October term of 1981, petitioner sought certiorari in a similar case and three justices voted to grant certiorari.[1] CNPA believes, however, that the infringement of First Amendment rights in the instant action is the most serious and grievous to date. The trial court not only excluded the public from the actual voir dire proceedings, but thereafter permanently sealed the transcript of those proceedings. The refusal of the California appellate courts and the California Supreme Court to review this trial court's action only serves to encourage other trial

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[1]The petition was in *Press-Enterprise Company v. Superior Court of California, County of San Diego*, Case No. 811022, the trial Court closed the entire voir dire proceedings and the appellate court ordered the transcripts to be released at the end of the jury selection. Although the petition was denied, Justices O'Connor, Marshall and Brennan voted to hear the case.

courts to take similar measures. At a time when this Court has so recently established and reinforced the public's right of access to criminal trials as guaranteed by the First Amendment, such action in California courts cannot be tolerated.

In California, as in the rest of the nation, the courts are increasingly under attack. The people's concern about the increase in crime in their lives has caused them to focus on the courts as they look for someone to blame for society's problems. The CNPA is concerned the apparent increase in the denial of access to the courts is a trend which will exacerbate the problem of the public perception of the courts and the administration of justice.

Statement of the Case and Constitutional Provisions Involved.

Your Amicus adopts the statement of the case as set forth in the Petition for Writ of Certiorari filed by Press-Enterprise Company.

Summary of Argument.

We urge upon the Court that, in light of its most recent decision in *Globe Newspaper Company v. Superior Court for the County of Norfolk* (No. 81-611) ... U.S. ..., 73 L. Ed. 2d 248, 102 S. Ct. ..., petitioner's request for a Writ of Certiorari should be granted. The public's First Amendment right of access to criminal trials is now firmly established. California trial courts are nonetheless arbitrarily closing the voir dire proceedings in capital cases.

Selection of the jury is an integral portion of the public trial. Public understanding of our system of justice is incomplete without an understanding of how the trier of fact is selected. Cloaking this important phase of the trial in secrecy only serves to engender suspicion and disrespect of the judicial system.

While the First Amendment right of access to trials is not absolute, it cannot be abridged arbitrarily. There must first be a showing of compelling governmental interest and the unavailability of less intrusive means to fulfill that governmental interest. The California Supreme Court decision in *Hovey v. Superior Court, supra,* 28 Cal. 3d 1, suggests no compelling interest which necessitates exclusion of the public from the voir dire proceeding. Further, neither the California Supreme Court in the *Hovey* decision nor the trial court in this instant action examined alternatives less intrusive on First Amendment rights before excluding the public from voir dire proceedings. Sealing the transcript of those proceedings in the instant action is totally unjustified.

Review by this Court is necessary to clarify the confusion existing in the California trial courts which has ensued from the *Hovey* decision. This decision, as it is being interpreted and applied by the California trial courts, is in direct conflict with this Court's recent decision in *Globe Newspaper Company v. Superior Court for the County of Norfolk, supra,* and violates petitioner's First Amendment right of access to criminal trials.

ARGUMENT.

I.

The Public Has a First Amendment Right of Access to Criminal Trials.

The existence of the public's First Amendment right to attend criminal trials cannot be seriously challenged in light or this Court's more recent decisions. In *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 61 L. Ed. 2d 608, 99 S. Ct. 2898 (1979), this Court conceded the existence of "a strong societal interest in public trials".

Later, in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973, 100 S. Ct. 2814 (1980), in a plurality decision, this Court recognized the right to attend criminal trials is implicit in the First Amendment guarantees. This Court determined that the historical evidence conclusively demonstrated that the presumptive openness of the trial was "no quirk of history" but rather was indispensable to our judicial system. Further, the Court stated that the explicit guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial was denied.

The existence of the public's First Amendment right of access to criminal trials was firmly established most recently in *Globe Newspaper Co. v. Superior Court for the County of Norfolk, supra.*

> "Although the right of access to criminal trials is of constitutional stature, it is not absolute. (Citations) But the circumstances under which the press and public can be barred from criminal trials are limited; the State's justification in denying access must be a weighty one." *Globe Newspaper Co. v. Superior Court, supra*, 73 L. Ed. 2d 248, 257.

II.

The Voir Dire Proceeding Is an Integral Portion of the Trial Process.

The voir dire examination of prospective jurors has been considered a public and integral part of the complete trial process (*Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W.2d 270 [1970], cited in the opinion of Justice Blackmun in *Gannett Co., Inc. v. De Pasquale*, 443 U.S. 368, 432, n. 12; *Rapid City Journal v. Circuit Court*, 283 N.W. 2d 563, 566, n. 5 [S.C. 1979], [citing *United States v. Woods*, 364 F.2d 481, cert. den. 385 U.S. 972 [3d Cir. 1966]). California case law states that the jury selection is an integral part of a public trial. *People v. Murphy*, 35 Cal. App. 3d 905 (1973); *People v. Teitelbaum*, 163 Cal. App. 2d 184 (1958).

The voir dire process is potentially the most important phase of any trial. The selection of the persons who sit in judgment, especially in a case of public notoriety, is a matter of fundamental concern. The process by which the impartiality and fairness of individual jurors is judged is a matter which must be widely understood and accepted in order for the public to accept the validity of trial results.

III.

The Trial Court in the Instant Action Arbitrarily Violated First Amendment Rights by Excluding the Public From the Voir Dire Proceedings and Thereafter Sealing the Transcript.

The trial court excluded the public from the voir dire proceedings using, as its basis for doing so, the *Hovey* decision. Thereafter, the trial court sealed the record using the rationale that the jurors had been questioned in the private voir dire proceedings regarding sensitive and highly

personal matters and that such information should not be released to the public.

In the *Hovey* decision, the California Supreme Court's concern was the impact of prospective jurors observing extensive death-qualifying questioning. Nowhere in the opinion did the Court discuss any effect the public's presence may have on venire persons.

Further, the fact that jurors may sometimes be asked to reveal highly personal and sensitive information does not justify total exclusion of the public from this important phase of capital trials. When "the State attempts to deny the right of access in order to inhibit disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest and narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court, supra*, 73 L. Ed. 2d 248, 257.

It is conceded that in some limited circumstances, it may be necessary to postpone the public's access to certain information until after a trial has been concluded. In the instant action, however, the public will forever be ignorant of what transpired during the voir dire proceeding due to the trial court's decision to permanently seal the transcript of those proceedings. Allowing the trier of fact to be selected entirely in secret not only violates the public's First Amendment rights but also endangers the entire judicial process by casting suspicion and doubt on its ability to function as a disciplinary arm of society.

IV.
Conclusion.

The public and press's First Amendment right to attend the criminal trials is now firmly established. Abridgement of this right cannot be arbitrary but must be supported by a showing that such infringement is necessitated by a com-

pelling government interest and that there are no alternatives less intrusive on First Amendment rights.

The absence of direction and clarity in the *Hovey* decision has resulted in an arbitrary violation of the public's rights to attend criminal trials. Further, the lower court's action in the instant case, expanding the *Hovey* decision to include sealing the transcript creates a dangerous precedent and incalculable risk for future disclosures of not only voir dire proceedings, but other parts of the criminal trial and by no means limited to capital cases.

The refusal of California courts and the California Supreme Court to review the action taken in the instant case makes the need for review by this Court more compelling. To allow this action to go unchallenged could be interpreted as tacit approval; thus encouraging California trial courts to continue to erode the public's right of access to trials.

Your amicus respectfully submits that review by this Court is essential to further clarify the rights of the public to attend criminal trials specifically the voir dire proceeding not only in capital cases, but all cases in which sensitive areas of voir dire examination may arise.

It is respectfully prayed that this Court grant a writ of certiorari, reverse the decisions below and grant a hearing to consider the rights of public to attend and observe the trial process.

Respectfully submitted,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF FOR PETITIONER ON THE MERITS.

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Questions Presented.

1. Does the public have a First Amendment right of access to the voir dire proceedings of criminal trials and a concomitant right to the transcript of the proceedings?

2. Did the respondent court, in applying the California Supreme Court decision in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), violate the public's First Amendment right of access to criminal trials?

3. Did the respondent court violate the public's First Amendment right of access to criminal trials by originating and applying a right of privacy of jurors?

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BRIEF FOR PETITIONER ON THE MERITS.

Opinions Below.

The Order of the Court of Appeal of the State of California was not reported. The Order of the Supreme Court of the State of California was not reported.

Jurisdiction.

The order of the Court of Appeal of the State of California, Fourth Appellate District, Division Two, was entered on May 13, 1982. The order of the Supreme Court of the State of California denying petitioner's petition for hearing was entered on June 30, 1982.

Under 28 U.S.C. Section 1257(3), petitioner sought this Court's jurisdiction.

On January 24, 1983, this Court entered an order granting a hearing.

Constitutional Provisions Involved.

United States Constitution, article III, section 2, subparagraph (1).

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

United States Constitution, first amendment.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, sixth amendment.

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

United States Constitution, fourteenth amendment, section 1.

> "[N]or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case.

Petitioner was denied access to attend and observe the voir dire proceedings of a pending criminal trial in the respondent court. Further, petitioner was subsequently denied access to the transcript of the closed proceedings.

Petitioner, The Press-Enterprise Company, is a California corporation which publishes two newspapers of general circulation, the Morning Press Enterprise and the Evening Press Enterprise, from its principal offices located in Riverside, California.

Albert Greenwood Brown, Jr. was the defendant in a case entitled *People of the State of California v. Albert Greenwood Brown, Jr.*, Riverside Superior Court Case No. CR 18104. The action involved a complaint filed by the Riverside County District Attorney's Office seeking imposition of the death penalty against Mr. Brown, arising out of the murder and rape of a teenage girl. (A. 40-45)

On October 19, 1981, prior to the commencement of jury selection, an oral and written motion was made by petitioner to allow public access to the voir dire examination of prospective jurors. After argument by petitioner's counsel, counsel for Mr. Brown and counsel for the People of the State of California, respondent court, through the Honorable J. William Mortland, denied petitioner's motion to keep the entire voir dire examination public. The court's order at that time was that the death-qualifying of the jurors, pursuant to the California Supreme Court decision of *Hovey v.*

Superior Court, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), would be done individually and in sequestration and outside the presence of the public. (A. 1, 46-51, 72-100)

Approximately three (3) days of open voir dire examination took place, and then the court, pursuant to its previous order, closed the remainder of the voir dire examination which lasted almost six (6) weeks. (A. 2-36)

On December 30, 1981, after the impanelment of the jury but before the calling of the first witness, petitioner again made an oral and written motion directed to respondent court, requesting that a complete transcript of the voir dire proceedings be released to the public. (A. 37, 52-60, 101-122)

Oral argument was heard from petitioner's counsel, counsel for defendant Brown and counsel for the People of the State of California. At the outset of the oral argument the court characterized the responses of the jurors as follows:

> "Most of them are of little moment. There are a few, however, in which some personal problems were discussed which could be somewhat sensitive as far as publication of those particular individual's situations are concerned." (A. 103)

Counsel for Mr. Brown argued first, that the real parties in interest to the motion were the prospective jurors who served on the entire venire panel. Secondly, counsel for Mr. Brown stated that the court would be violating the jurors' constitutional right of privacy if the transcript was released. (A. 104, 108)

At this hearing, counsel for the People of the State of California agreed with the position of counsel for Mr. Brown. In addition, counsel for the People argued that the

jurors answered questions under an "implied promise of confidentiality."

Counsel for the People summarized the closed voir dire proceedings as follows:

> "There was, throughout the proceeding, Your Honor, I think by the court's own words and actions, as well as the words and actions of the defense counsel, an implied promise of confidentiality regarding the subject matter of what was being discussed." (A. 111)

At this hearing, the court concluded as follows:

> "I agree with much of what defense counsel and People's counsel have said and I also, regardless of the public's right to know . . . I just think there is certain areas that the right of privacy should prevail and a right to a fair trial should prevail and the right of the people to know, I think should have some limitations, so at this state, the motion to open up anything that has been ordered sealed, including again, the individual sequestered voir dire proceedings is denied without prejudice." (A. 121)

On February 23, 1982, after Albert Brown had been tried, convicted, and sentenced to death, petitioner made an oral and written ex parte application for release of the transcript of the voir dire proceedings. (A. 39, 64-67)

Respondent court, after considering the application of petitioner for release of the transcript of the voir dire proceedings, denied the application and issued the following order:

> "The jurors were questioned in private relating to past experience, and while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (A. 39)

Petitioner sought relief in the Court of Appeal for the Fourth Appellate District, Division Two, in a petition for writ of mandate to compel the respondent court to vacate its order and release the transcript to the public, and order

the respondent court to vacate its order denying petitioner's request to be present during the voir dire proceedings.

The appellate court, through the Honorable J. Douglas McDaniel, Acting Presiding Justice, summarily denied petitioner's request without articulation.

Immediately following the Court of Appeal order, petitioner sought a hearing with the Supreme Court of the State of California. On June 30, 1982, the Supreme Court of the State of California denied petitioner's request for a hearing.[1]

Three orders by respondent court are submitted to this Court for review on certiorari jurisdiction: the initial order closing the death-qualifying of the voir dire proceedings; the second order, December 30, 1981, sealing the transcript, without prejudice, after the voir dire proceedings were concluded; and, the permanent order sealing the transcript entered on February 23, 1982.

Summary of Argument.

The public's right of access to criminal trials, specifically the voir dire proceedings in a capital case, is the primary issue before the court.

The trial court used as its rationale for closing the courtroom in the first instance the California Supreme Court case of *Hovey v. Superior Court*. The *Hovey* decision requires that jurors be selected individually and in "sequestration." The Supreme Court based its decision upon a study which was undertaken to determine the effects of death-qualifying questioning of prospective jurors in capital cases. There was nothing in the study nor in the issues before the *Hovey* court which involved the influence of the public or press upon

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[1]The order entered by the California Supreme Court on June 30, 1982, indicated that Chief Justice Rose Bird, the author of the opinion in *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980), requested that the case be heard.

the prospective jurors. Further, the opinion in *Hovey* specifically says that the ruling should have no impact upon the openness of the trial.

The trial court erred in the application of *Hovey*. The *Hovey* decision can be applied without closing the courtroom. The decision does not require closure in order to accomplish its purposes.

If the decision is interpreted, however, to require closure of the courtroom, it is in that respect unconstitutional in that it would violate the right of petitioner to access to the courts. The use of the word "sequestration", without definition, renders the decision vague and overly broad.

After the jury was impaneled in secret, petitioner attempted to obtain a transcript of the proceedings. The respondent court, supported by prosecution and defense counsel, held that the right of privacy of jurors was at issue since the questioning had delved into several areas which, in its opinion, should be sheltered from public view. On that basis the court sealed the transcript of the secret proceedings.

Petitioner's right of due process was violated in the handling of the privacy question by the trial court. If any right of privacy of jurors came into conflict with the petitioner's First Amendment right of access, petitioner should have been given notice and an opportunity to be heard. The respondent court did not so provide.

Petitioner's right of access to the voir dire proceedings should be established by a decision of this Court, and the respondent court should be required to release the transcript of those proceedings.

ARGUMENT.

I.

THE PUBLIC HAS A FIRST AMENDMENT RIGHT OF ACCESS TO THE VOIR DIRE PROCEEDINGS OF CRIMINAL TRIALS.

The public, including the press, has traditionally had access to criminal trials. The right of access evolved historically in the common law and has been established as a constitutional right. This right applies to the entire trial, with the instant focus on the voir dire proceedings in capital cases.

A. The *Richmond* and *Globe* Cases Established a First Amendment Right of Access to Criminal Trials.

This Court, in *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. 555 (1980), clearly enunciated the fundamental concept that the public has a right to attend criminal trials.

> "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' *Branzburg, supra*, 408 U.S. at 681, 92 S.Ct. at 2656." *Richmond Newspaper, Inc. v. Virginia*, 448 U.S. at 580.

This important concept was reaffirmed by this Court in *Globe Newspaper Company v. Superior Court*, 102 S.Ct. 2613 (1982). In that decision the majority opinion described *Richmond* as having "firmly established for the first time that the press and general public have a constitutional right of access to criminal trials." *Globe Newspaper Company*, 102 S.Ct. at 2618.

B. Voir Dire Is an Integral Part of the Trial.

This Court is now asked to clarify the right of access to the courts and to focus upon a specific portion of the criminal trial, the selection of the jury in a capital case.

While this Court has not passed upon this specific question, the subject was addressed recently by the Ninth Circuit Court of Appeals in *United States v. Brooklier*, 685 F. 2d 1162 (9th Cir. 1982). That case involved a district court's partial closure of the voir dire of prospective jurors. The government contended that the public's right of access applied only to "trials", and that the voir dire was a pre-trial procedure, and thus not under the umbrella of the *Richmond* case. The circuit court disagreed, stating that the voir dire is considered "part of the trial itself," citing other appellate courts on this important principle. *Id.* at 1167.[2] The court then noted two basic principles supporting the right of access. First, historically criminal trials have "been open to the press and general public," and second, the public's access to criminal trials "plays a particularly significant role in the function of the judicial process and the government as a whole." *Brooklier*, 685 F. 2d at 1167. The Ninth Circuit Court of Appeals could find no historical evidence that voir dire was ever conducted in secret. *Id.*

In California, the impaneling of the jury has been considered a part of the public trial guaranteed to the defendant by the Sixth Amendment. *People v. Tietelbaum*, 163 Cal. App. 2d 184 at 206, 329 P. 2d 157 at 172 (1958). The right to voir dire by counsel was established in California in 1855. *People v. Badrus*, 5 Cal. 275 (1855). Since that time the

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[2] *United States ex rel. Pulitzer Publishing Co.*, 635 F. 2d 676 (8th Cir. 1980); *Commercial Printing Co. v. Lee*, 262 Ark. 87, 553 S.W. 2d 270, 271 (1977); *Great Falls Tribune v. District Court*, 608 P. 2d 116, 120-121 (Mont. 1980).

voir dire process has often been reviewed by the California courts but it has never been considered as a closed proceeding. The voir dire, like the rest of the trial, has been considered by the courts to be naturally and historically an open process.[3]

C. Open Voir Dire Benefits and Strengthens the Entire Trial Process.

The right of trial by jury is unique to the democratic form of government. Blackstone, in his third book of *Commentaries*, chapter 23, refers to trial by jury as a trial "per pais", or by the country. He then elucidates upon the democratic nature of the institution and how the people esteemed it so highly that through the centuries no changes in government could "ever prevail to abolish it." 3 *Blackstone Commentaries* 271 (G. Tucker ed. 1803).

Blackstone did not expressly state that the jury selection process had to be an open one. It is implicit in an understanding of the institution. It is inconceivable that the populace that insisted upon the existence of the institution would be denied access to the process of selecting its members.[4]

When the jury as an institution crossed the Atlantic to America, it became in colonial times a symbol of rebellion against the Crown and a "bulwark in favor of democracy",

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[3]*People v. Williams*, 29 Cal. 3d 292, 628 P. 2d 869, 174 Cal. Rptr. 317 (1981); *People v. Murphy*, 35 Cal. App. 3d 905, 111 Cal. Rptr. 295 (1973); *People v. Edwards*, 163 Cal. 752, 127 P. 58 (1912).

[4]The importance of the public nature of the jury process is emphasized by Blackstone in dealing with another portion of the jury process. He refers in Chapter 23 of the third book of *Commentaries* to two types of verdicts in use in the 18th Century, a privy verdict and a public verdict. Occasionally, the jury, in order to be "free of their confinement" gave their verdict in privy to the court. Any such act would have to later be followed by an open or public verdict. The law was clear that only the public verdict was the "effectual and legal verdict", and, indeed, if a conflict existed between the two verdicts the public one prevailed. 3 *Blackstone Commentaries* 292 (G. Tucker ed. 1803).

R. Simon, *The Jury, Its Role in American Society* 5 (1980). The Zenger trial was a case in point, wherein the jury resisted the pressures of the government by acquitting Zenger of a charge of seditious libel. Where the jury is viewed as a protector of the public against the government, the selection of the members of the jury certainly cannot be done in secret by representatives of the government.

Frequently, today, all of the people involved in the criminal process are employees of the government, *i.e.*, the judge, the prosecutor, and the public defender. Respondent's position permits them to select the jury in secret.

Trial by jury as an institution carries with it the concomitant demand "that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950). This Court has long held that "A trial is a public event. What transpires in the courtroom is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1942).

A fundamental goal of society is to see that its members, when accused, are given a fair trial. In pursuit of this goal, appellate courts routinely review the voir dire examination to pass upon the question of whether a fair and impartial jury was impaneled. In each of the following cases this Court looked to the voir dire process to help determine if the defendant had received a fair trial: *Murphy v. Florida*, 421 U.S. 794 (1975); *Beck v. Washington*, 369 U.S. 541 (1962); *Irvin v. Dowd*, 366 U.S. 717 (1961); *Stroble v. California*, 343 U.S. 181 (1952); *Shepherd v. Florida*, 341 U.S. 50 (1951).

Just as this Court must look to the voir dire process to test for fairness, so must the public have access to the

process to make its own determination of fairness. Without an open voir dire process the public is unable to make an informed judgment of the entire trial proceedings since it is during voir dire that the trier of fact is selected.

An open jury selection process provides an educational opportunity to society as a whole. This Court in *Richmond* cited 6 J. Wigmore, *Evidence* 1834 (J. Chadbourne Rev. 1976):

> "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy." *Richmond*, 448 U.S. at 572.

This rationale is particularly applicable to the narrow question of the public's right of access to the voir dire proceedings. In order to have confidence in the system the public must be aware of the process by which members of the jury are selected.

Generally, an entire community cannot serve on a jury. This Court has noted that a natural historical progression has resulted in a delegation of twelve members of the community to serve as jurors, but "the community did not surrender its right to observe the conduct of trials. The people retained 'a right of visitation' which enabled them to satisfy themselves that justice was in fact being done." *Richmond Newspaper v. Virginia*, 448 U.S. at 571.

The importance of the voir dire proceedings is magnified by the nature of the instant case. This voir dire involved the selection of twelve individuals who found the defendant guilty of murder and imposed the death penalty. Society's need for an understanding of its judicial process is most acute in a capital case. When these twelve members are

secretly selected to determine whether the government shall take a life, how can society satisfy itself that justice is done, when the qualifications, competence, and fairness of these representatives of the community cannot be known or assessed?

II.

THE RESPONDENT COURT IN CLOSING THE COURTROOM AND SEALING THE TRANSCRIPT VIOLATED PETITIONER'S FIRST AMENDMENT RIGHTS.

The trial court entered three orders that have been submitted to this Court for review. On October 19, 1981 respondent court ordered that the voir dire proceedings concerning death-qualifying of the jurors be closed. This was based upon the court's interpretation and application of the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980). This was followed by three days of voir dire open to the public, and almost six weeks of closed voir dire.

After the jury was impaneled, but prior to the calling of the first witness, the court, at the December 30, 1981 hearing, denied without prejudice petitioner's request to release the transcript of the voir dire proceedings.

Finally, at the February hearing, after the defendant had been tried, convicted, and sentenced to death, the court denied petitioner's ex parte application to release the transcript of the closed voir dire proceedings. The last two rulings were apparently based upon a right of privacy of prospective jurors.

The initial order of respondent court excluding the public from the voir dire proceeding may not at first appear to be an appropriate subject for review by this Court. Since the voir dire has been completed and the trial is over, the question arises as to whether a live controversy remains. Under article

III, section 2 of the United States Constitution, this Court's jurisdiction extends only to actual cases and controversies. Ordinarily this Court will not accept a case for review which has been rendered moot.

In *Globe Newspaper Company, Inc. v. Superior Court*, 102 S.Ct. 2613 (1982), this Court determined that the issue of the exclusion of the press and public during the trial involving a minor victim was not moot within the meaning of Article III. In arriving at this conclusion, the Court stated that it could be reasonably assumed that others would some day be subjected to a similar exclusion, and that the order would likely evade review because of the typically short duration of criminal trials.

The initial closing of the voir dire proceedings in this case is also one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Even in this trial court's small jurisdiction, there have been numerous instances of court closure on the same rationale.[5] Typically, an order closing the voir dire is of short duration and cannot be reviewed during the pendency of the proceedings. Under the rationale of *Globe Newspaper v. Superior Court*, this issue remains an appropriate subject for review by this Court. See also *Nebraska Press Asso-*

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[5]Since July, 1981 in Riverside County there have been a variety of applications of the *Hovey* mandate; in two cases the courts held an open voir dire (*People v. Flores*, CR 18960; *People v. Malone*, ICR 7162); in three cases voir dire was closed to the public during the death-qualifying questions (*People v. Burgener*, CR 18088; *People v. Weyant*, IRC 7117; and *People v. Huffman*, CR 18777; and in two cases the entire voir dire was closed (*People v. Boyde*), CR 18348; *People v. Smith*—transferred to San Diego Superior Court CRN 6940).

In those cases that were closed totally or in part, four courts did not seal the transcripts of the voir dire proceedings (*Malone, Flores, Weyant* and *Huffman*), two courts sealed the transcripts but released them at a later date (*Smith* and *Burgener*), and two courts sealed the transcript permanently (*Boyde* and the instant case).

ciation v. Stuart, 427 U.S. 539 (1976); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Roe v. Wade*, 410 U.S. 113 (1973).

There can be no doubt that a live controversy remains as to the respondent court's order sealing the transcript of the voir dire proceedings. This order remains in effect until further order by an appellate court under proper review and thus qualifies as an actual case or controversy under article III, section 2 of the United States Constitution.

The initial exclusion from the courtroom violated petitioner's First Amendment rights and access to the transcript at this time will not fully remedy the wrong which occurred. The transcript is a poor substitute for actually being in the courtroom. Present during the proceedings, an observer can note many aspects which are not reflected in the transcript. The transcript does not provide the observer with a clear picture of the mood of the proceedings, or record the demeanor and mannerisms of participants and witnesses. Nonetheless, access to the transcript at this time would provide some knowledge regarding the voir dire proceedings in this case and should be made available to the public.

A. The California Supreme Court Decision in *Hovey v. Superior Court* Cannot Be Used to Close the Courtroom.

1. *Hovey* Does Not Require the Closure of the Courtroom.

The initial order of the court was based on the California Supreme Court case of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P. 2d 1301, 168 Cal. Rptr. 128 (1980). This decision is not a proper basis for excluding the public from the voir dire proceedings.

The California Supreme Court was faced in *Hovey* with the question of whether a juror should be removed from the panel in a capital case because the juror was "unequivo-

cally" opposed to the imposition of the death penalty. *Hovey v. Superior Court*, 28 Cal. 3d at 7. On that specific issue, after considering almost two dozen studies, experiments, and surveys, the court decided that there was insufficient evidence at that time on which to reverse the trial court's order excluding such jurors from the panel. *Id.* at 68-69.

Thereafter, the *Hovey* court went on to discuss and ultimately decide that the procedure for identifying death-qualified jurors used in California was potentially prejudicial to a defendant's right to a fair trial. In arriving at this decision, the court relied upon a single study by Dr. Craig Haney, Assistant Professor of Psychology at the University of California at Santa Cruz. The study, conducted in 1979, polled only 67 persons who had viewed a simulated video-tape voir dire proceeding. The participants were divided into two groups. Both groups viewed the same voir dire video-tape, but the "experimental" group was shown an additional half an hour of death-qualifying voir dire.

The California Supreme Court summarized the Haney study in its opinion as follows:

> "Haney's findings indicate that the current process of selecting capital jurors creates certain side effects which shape the jury's attitudes toward a death sentence. . . .
>
> "Haney testified that the prejudicial alteration in attitudes which resulted from a juror's observation of the death-qualification of his or her fellow prospective persons is 'a function of exactly how extensive the questioning becomes. The more extensive the questioning, the more you would expect to find important differences between the state of mind of jurors who have been through the one process as compared with those who have been through the other.' This proposition implies a corollary: 'The extent to which [these

effects] are minimal will be a function of the extent to which the questioning is minimized.' "

Hovey v. Superior Court, 28 Cal. 3d at 79, 80, 616 P. 2d at 1353, 168 Cal. Rptr. at 180, 181.

Based upon the Haney study, the California Supreme Court concluded its opinion as follows:

"In order to minimize the potentially prejudicial effects identified by the Haney study, this court declares, pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying, the jury should be done individually and in sequestration. This rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons."

Hovey v. Superior Court, 28 Cal. 3d at 80, 81, 616 P. 2d at 1354, 168 Cal. Rptr. at 181.

The Haney study did not attempt to evaluate any effect the presence of the public had upon prospective jurors during the voir dire. The *Hovey* decision, likewise, does not address the issue of the presence of the public and press during voir dire.

Respondent court's initial order closing the voir dire was obviously invoked to protect the defendant's Sixth Amendment right to a fair trial. In this regard petitioner acknowledges that the public's right of access is not absolute and in limited circumstances must yield to defendant's Sixth Amendment rights. In those limited situations, articulated findings, based on a court's consideration of reasonable

alternatives short of closure, must produce a clear overriding interest which requires closure of the courtroom.

Reasonable alternatives were considered in *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). In that landmark case this Court dealt with a prior restraint. The Court in the instant case is not faced with a prior restraint per se. Instead of allowing the public access and then ordering the media restrained from publishing, respondent court simply closed the courtroom. The effect is the same. The free flow of information to the public is curtailed. Denial of the public's right of access in the instant case and the prior restraint in the *Nebraska Press Association* case are similar evils that warrant similar constitutional treatment. The respondent court did not consider reasonable alternatives short of barring the press and the public from the trial.

2. If the *Hovey* Mandate Is Used to Deny a Right of Access to the Court, the Mandate Is Unconstitutional.

The California Supreme Court's mandate in *Hovey* regulating First Amendment freedoms was not drafted with narrow specificity. The California Supreme Court's failure to adequately define sequestration renders the mandate unconstitutionally vague and ambiguous. The mandate taken on its face could be interpreted to mean sequestration of the jury in the traditional sense which means that the jury is removed from public contact; it is set apart.[6]

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[6] *Black's Law Dictionary*, Fifth Edition (1979) defines sequester as follows:

> To separate or isolate: e.g. to sequester jurors is to isolate them from contact with the public during the course of a sensational trial.

The *Oxford English Dictionary*, Volume IX (1970) defines sequester as follows:

> 1. To set aside, separate. (a) To separate and reject; to eliminate; chiefly in material sense, to set aside, dismiss from consideration. . . . (e) To seclude (a person, thing or place) from general access or intercourse; to keep apart from society.

Hovey v. Superior Court is different than ordinary appellate decisions and different from most cases decided by California's highest court in a very important respect. *Hovey* mandated a specified process for the selection of jurors in capital cases. It was based upon the California Supreme Court's "supervisory authority over California criminal procedure". *Hovey*, 28 Cal. 3d at 80, 616 P. 2d at 1354, 168 Cal. Rptr. at 181. It not only decided the case before it, but it had the same force and effect as an addition to the California Penal Code regarding jury selection in capital cases. The case was decided without participation by any party representing the public's First Amendment rights.

Appellate decisions, including those of the California Supreme Court, can later be used as precedent or distinguished, depending upon the facts and circumstances of individual cases. Such is not the case with *Hovey v. Superior Court*. It applies to any criminal case in which the State of California is seeking imposition of the death penalty. Thus it should be reviewed by the same standard as legislative enactments.

Webster's Third New International Dictionary (1968) defines sequester as follows:

1. . . . To set aside for safe keeping, surrender, remove, separate, . . . (a) To set apart, separate for special purposes . . . (c) To hide from public view; withdraw from circulation; seclude, secret . . .

Webster's New International Dictionary, Second Edition (1934) defines sequestration as follows:

1. Act of sequestering or state of being sequestered; . . . (a) separation; disjunction; a putting or setting aside; (b) a withdrawing; retirement; seclusion, as from society.

The *Random House Dictionary of the English Language* (1967) defines sequestration as follows:

1. Removal or separation; banishment or exile.
2. A withdrawal into seclusion; retirement. . . .

The *Hovey* mandate is overly broad and vague concerning the proper application of "sequestration".

In *Globe Newspaper* this Court stated that the mandatory provision of the Massachusetts statute calling for closure of the court in sex crimes where the victims were minors was unconstitutional because it was not narrowly drawn and tailored to serve a particular interest. The same analysis can be applied to the *Hovey* mandate. The California Supreme Court's failure to define sequestration has led to confusion in the application of that mandate and court closures throughout the State of California. Since the mandate was not narrowly tailored to serve the state's interest in avoiding the prejudicial effects described in the Haney study, the mandate is unconstitutional.

This Court has reviewed many statutes limiting First Amendment rights. Such statutes were subject to attack through the due process clause on the grounds that they were vague and ambiguous. *NAACP v. Button*, 371 U.S. 415 (1963); *Smith v. People of the State of California*, 361 U.S. 147 (1959); *Murdock v. Commonwealth of Pennsylvania*, 319 U.S. 105 (1942); *Stromberg v. People of the State of California*, 283 U.S. 359 (1930).

In *NAACP v. Button*, this Court noted that "it makes no difference that the instant case was not a criminal prosecution and not based on a refusal to comply with a licensing requirement. The objectionable quality of vagueness and overbreadth does not depend upon the absence of fair notice to a criminally accused or upon unchannelled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of a sweeping and improper application." *NAACP*, 371 U.S. at 432, 433. A well-settled concept in the area of First Amendment rights is that "standards of permissible statutory vagueness are strict in the area of free

expression," *NAACP v. Button*, 371 U.S. at 432. This Court is asked to apply the same analysis to the mandate contained in *Hovey v. Superior Court*.

B. In Asserting the Right of Privacy of Prospective Jurors Respondent Court Violated Petitioner's Right of Due Process.

After the voir dire was completed the respondent court's orders were based upon an asserted right of privacy of prospective jurors, and the promises of confidentiality made by trial counsel and the court. Petitioner does not know the extent of the promises. The only record available to petitioner is the argument of counsel and the comment of the trial court. (A. 101-122)

The oral argument on petitioner's December 30 motion to release the transcript of the voir dire proceedings emphasizes two important facts: First, the privacy protection was given to the jurors by the court after voir dire had been completed in secret; Second, not all of the closed voir dire related to what counsel considered "sensitive and private" areas. These facts are significant for analyzing the procedural aspects of petitioner's First Amendment rights and any right of privacy of prospective jurors.

This Court has firmly established that petitioner has a right of access to criminal trials. This right must be afforded the same procedural due process protection accorded all other constitutional rights. At a minimum, due process requires notice and the opportunity to be heard. This is not a difficult concept in relation to the specific right of access to the voir dire proceedings. The Ninth Circuit Court of Appeals in *Brooklier* noted two procedural prerequisites to closing a criminal proceeding to the public: (1) those excluded from the proceeding must be afforded a reasonable opportunity to state their objections; and (2) the reasons

supporting closure must be "articulated in findings." *United States v. Brooklier*, 685 F. 2d at 1167-1168.

Neither of these prerequisites were met in this case. When the issue of alleged privacy of prospective jurors arose, if at all, the petitioner had already been excluded from the courtroom. The only notice of the privacy question was given after the voir dire was completed, at the hearing on December 30, when petitioner sought a release of the transcript.

In order for notice and hearing to be meaningful, petitioner should have prior knowledge of the assertion of the right of privacy. Such knowledge must include all of the surrounding facts and circumstances which includes the personal characteristics of the juror, and the nature and extent of the questioning.

The only reasons given by the court after the trial was completed were that "while most of the information is dull and boring, some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (A. 39) According to counsel's comments the "sensitive and private" areas alluded to by the court involved race, sex, politics and religion. (A. 104)

This after-the-fact justification, based on these mere conclusionary statements of trial counsel and respondent court, falls short of the "articulated findings" required by *Richmond* and *Brooklier* and hardly qualifies as a "weighty justification" required by this Court in *Globe Newspaper*.

When focusing on this asserted right of privacy, no consideration of the defendant's Sixth Amendment right to a fair trial is involved. Under the present state of the law in California almost any question that trial counsel asks during the voir dire proceedings is allowed and must be answered. The conflict therefore is between a prospective juror's as-

serted right of privacy and the petitioner's established First Amendment right of access.

In this context a court should consider the public's interest that "society's criminal process 'satisfy the appearance of justice' " in the selection of an impartial jury. *Richmond Newspaper v. Virginia*, 448 U.S. 571; *Offutt v. United States*, 348 U.S. 11 (1954); that "what transpires in a courtroom is public property", *Craig v. Harney*, 331 U.S. at 374; that "judicial proceedings arising from prosecutions, however, are without question, events of legitimate concern to the public", *Cox Broadcasting System v. Cohen*, 420 U.S. 469, 492 (1975); and finally, and most importantly that, "openness in court proceedings may improve the quality of testimony". *Globe Newspaper Company, Inc. v. Superior Court*, 102 S.Ct. at 2622, n. 26, quoting *Gannett*, 443 U.S. at 4383.

The Court in *Globe Newspaper* construed the mandatory provisions calling for closure of Massachusetts courtrooms in cases involving minor victims of sex crimes as being too broad and not "narrowly tailored" to serve the state's interests. *Globe Newspaper*, 102 S.Ct. at 2620. Should it be assumed a juror's right of privacy exists and that the state has legitimate concern in protecting that interest, then any rule or procedure must be "narrowly tailored" to serve that interest. In the instant case the court applied a blanket order to the entire voir dire and sealed the transcript.

The procedure used by respondent court in sealing the entire transcript is not "narrowly tailored" to serve any juror's right of privacy in these areas. The identity, age, experience and circumstances of each individual juror and the type of question asked must be considered before a trial court can decide that a legitimate right of privacy exists. These factors should have been considered by the respondent

court in reaching "articulated findings" to support any overriding interest.

Closing the voir dire and sealing the record creates a dangerous atmosphere which lends itself to perjury and other misconduct, including coverup. Most people will tell the truth when being questioned, but those few who are inclined to lie will be more likely to do so when there is no fear of being discovered. With closure, a court eliminates that fear by assuring that the responses of the prospective jurors will never be heard beyond that secret chamber and that no one will ever discover any lack of truthfulness in the answers given.

It is clear from the record below that respondent court did not procedurally protect petitioner's right of access and therefore the order sealing the transcript must be vacated.

Conclusion.

There is an ominous progression; first, the *Hovey* mandate itself, vague and hardly overburdened with empirical evidence to support it; then, trial court interpretation of the mandate to order exclusion from the death-qualifying examination of the public rather than the simple separation of venirepersons, each from the others; then, a broadening of the cited exclusion to apply to the general, as well as the death-qualifying questioning—the closing of the entire voir dire process; now the permanent sealing of the transcript of the entire voir dire.

Thus, a monster grows, and there has been a disturbing unwillingness on the part of California appellate courts to protect the public's young First Amendment right of access. But if it is not confronted, the spread will continue.

For if the procedures described are wise in capital case, why not in non-capital cases? Few courts would proudly argue for secret voir dire and permanently sealed transcripts

of voir dire proceedings in all cases. Yet that is the direction; and if logic and law support what has already evolved in the wake of *Hovey*, logic and law will support the frightening extension of the application described.

The order of the respondent court closing the voir dire should be vacated and the court should be ordered to release the transcript.

Respectfully submitted,

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*Petitioner and counsel for petitioner gratefully acknowledge the assistance of Ms. Sharon J. Waters, J.D. 1981, in preparation of this brief.

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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF OF RESPONDENT ON THE MERITS.

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Petitioner,

vs.

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Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,

Defendant.

BRIEF OF RESPONDENT ON THE MERITS.

Jurisdiction.

Questions have been raised as to this Court's jurisdiction in this case. Petitioner's brief appears to suggest that the case may be moot because *voir dire* is now completed and the trial is over in the underlying case. (Br. 13-15.) Since the *voir dire* transcript is still sealed from the public, Petitioner's fears seem unfounded. (*Gannett Co. v. De Pasquale* (1979) 443 U.S. 368.) Similarly, the State of California surmises the case is procedurally flawed because the

initial petition for review was filed with the State Court of Appeal although all death-penalty cases are automatically appealed directly to the Supreme Court of California pursuant to the Constitution of the State of California, Art. VI, Section 11. (Br. 10, n.3.)

However, it seems unlikely that a petition for review of the issues in this case would be governed by any automatic appeal provisions. Moreover, Petitioner did file a petition for review in the Supreme Court of California after the denial by the Court of Appeal; thus the procedural deficiency, if any, would seem to have been cured.

Constitutional Provisions Involved.

In addition to the Constitutional provisions referred to by Petitioner Newspaper, Respondent Court would add:

United States Constitution, Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Statement of the Case.

Albert Greenwood Brown, Jr., the defendant in the underlying criminal action was charged with and ultimately convicted of the rape and murder of a teenage girl (J.A. 40-45.) Because he was convicted of having committed the murder in connection with the rape, a special circumstance under California Penal Code, Section 190.2(a)(17)(iii), he was sentenced to death. His appeal from that judgment is now pending before the Supreme Court of California.

On October 19, 1981, prior to the commencement of the jury *voir dire*, the Petitioner Newspaper made a written motion for an order that the press and public be afforded access to the entire jury *voir dire*. (J.A. 46-51.) The Respondent Trial Court ruled that the general *voir dire* questioning

would be open to the public but that *voir dire* as to the death-qualifying issues and any other special areas into which trial counsel wished to inquire, would be held in private. (J.A. 1, 93.) In the end, there were approximately three days of general *voir dire* which was open to the public and nearly six weeks of *voir dire* which was conducted in private.

On December 30, 1981, after completion of the *voir dire*, the Newspaper moved the Trial Court for the release of the *voir dire* transcripts. (J.A. 52-60); the motion was denied. (J.A. 37.) On February 23, 1982, after the trial was completed, the Newspaper made an ex parte application for release of the jury *voir dire* transcripts.[1] (J.A. 39, 64-65.) This application was denied.[2]

Summary of Argument.

This Court has recognized that the public's right of access to criminal trial is not absolute and that the press and the public may be barred from a criminal trial in appropriate cases, if it is shown that there is a compelling governmental interest which justifies such closure. (*Globe Newspaper Co. v. Superior Court* (1982) ____ U.S. ____, 102 S.Ct. 2613, 73 L.Ed.2d 248, 257).

Here, the Trial Court found that closure of part of the *voir dire* was justified, given the peculiarly sensitive facts

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[1]Although there was extensive oral argument at the first two hearings (no record appears to have been made of the *ex parte* hearing), the only written opposition to any of the motions were two letters written by Joseph Peter Myers, counsel for the defendant. (J.A. 61-63, 68-70.)

[2]An additional hearing was held on May 17, 1983, when the Attorney General of the State of California representing the People in the appeal in the Supreme Court of California, requested clarification from the Trial Court as to its order sealing the *voir dire* transcripts. The Trial Court ruled, in essence, that the transcript was to remain sealed from the public, but could be utilized in a confidential manner in the appellate process by appellate counsel or anyone else legitimately involved in that process.

of the underlying case, in order to protect and preserve the Sixth Amendment right of the defendant and the prospective jurors' right of privacy. At the conclusion of the trial, the Trial Court accordingly refused to release the transcript of that *voir dire* which had been conducted *in camera*, because it was found that to do so would violate the right of privacy of the jurors and all the other venirepersons who had given their testimony in an atmosphere conducive to the belief that their responses would not be released to the public. Such closure was done in compliance with the three-pronged standard of *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555.

The right of privacy of prospective jurors is a vital concept, particularly in California, in order to ensure fair trials in capital cases and protect the jury system, because of two recent decisions of the Supreme Court of California. In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, it was held that prospective jurors must be questioned individually and out of the presence of other prospective jurors as to the death-qualification issues. And in *People v. Williams* (1981) 29 Cal.3d 392, it was held that counsel are entitled to ask questions of a prospective juror that are reasonably designed to assist in the intelligent exercise of peremptory challenges, whether or not such questions are likely to uncover grounds sufficient to sustain a challenge for cause.

The State has a vital interest in protecting the jurors' right to privacy. Prospective jurors should not be forced to leave their rights at the doorstep of the courthouse; they should not be forced to divulge private matters, information for which the State would otherwise have to demonstrate a compelling interest to invade simply because they are performing their civic duty.

Inherent in this situation is the balancing of the right of the press and public to attend criminal trials and the right

of the defendant to a fair trial and the right of the prospective juror not to have his right of privacy unduly invaded. The essential question here is *not* whether prospective jurors have a right of privacy. Rather, the essential question is whether prospective jurors have a right of privacy which may, in appropriate cases, outweigh the public's right of access to criminal trials and permit the trial court to close to the public jury *voir dire* which invades that right.

Here, the defendant and the People were afforded the widest scope in examining the prospective jurors, which included questions dealing with traditionally personal and sensitive topics such as race, religion, sex and politics. But because of the sequestered nature of the *voir dire*, the jurors were also impliedly assured that their responses to these inquiries would remain confidential. The Trial Court struck a balance between the counter-vailing rights involved, by allowing the parties to inquire into, but by disallowing the publication and dissemination of, the sensitive portions of the *voir dire* and by allowing public access to the remainder of the trial.

ARGUMENT.

I.

The Right of the Public to Attend Criminal Trials Is Not Absolute and May Be Denied in Appropriate Cases.

It is well settled that the press and the public have a First Amendment right to attend criminal trials (*Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555; *Globe Newspaper Co. v. Superior Court* (1982) ___ U.S. ___, 102 S.Ct. 2613, 73 L.Ed.2d 248), and that this right of access extends to the *voir dire* of prospective jurors.[3] (*United States v. Brooklier* (9th Cir. 1982) 685 F.2d 1162.) This right, however, is clearly not absolute. (*Globe Newspaper, supra*, 73 L.Ed.2d at 257.)

Situations can and do arise where a public or personal right must, because of a countervailing public or private right, give way. And, although this Court has recognized that "the circumstances under which the press and public can be barred from a criminal trial are limited" (*Globe Newspaper, supra*, 73 L.Ed.2d at 257), explicit within that statement is the fact that under appropriate circumstances, and in appropriate cases, the right of the press and the public to attend criminal trials may be abridged. Certainly closure may not be arbitrary, nor may it occur simply on the basis of an agreement between the judge and the litigants that closure is preferred. But this Court has consistently indicated

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[3]Counsel for defendant Brown argued at the October 19 hearing that jury *voir dire* was not "part of the trial" and thus there was no First Amendment right of access of the press or public. (J.A. 105, 107.) Authority in California, however, is to the contrary (*People v. Teitelbaum* (1958) 163 Cal.App.2d 184, 206-207) and this theory was not a ground on which the Trial Court exercised its discretion to partially close *voir dire* in this case. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450.)

that a criminal trial may be closed, in whole or in part, at the discretion of the trial judge if closure is justified under the standard set forth in *Richmond Newspapers*. (*Id.*; accord, *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free-Press — Fair Trial" Issue*, as approved by the Judicial Conference of the United States on September 25, 1980, in 87 F.R.D. 519 (1981).)

Here, the general jury *voir dire*, the trial and the sentencing all were open to the public and the press. Only that part of the jury *voir dire*, which threatened the privacy rights of the prospective jurors was closed. Such closure is consistent with both *Richmond Newspapers* and *Globe Newspaper*, and was, under the circumstances of this particular case, necessary and proper.

II.

The Denial of the Public's Right of Access to the Jury *Voir Dire* in This Case Was Proper Under the Three-Pronged Standard of *Richmond Newspapers*.

In *Richmond Newspapers*, this Court set forth a three-pronged standard which must be met before a court may close all, or any part of a criminal trial:

> First, whether there are findings on the record to support such closure.
>
> Second, whether the trial court considered solutions alternative to the closure of the trial.
>
> Third, whether the trial court recognized the constitutional right of the public and press to attend the trial. (*Id.*, 448 U.S. at 580, 581.)

Although the Newapaper argues that none of the procedures outlined in *Richmond Newspapers* were followed, and that closure was done arbitrarily, a review of the record belies that claim. Indeed, the record reveals that the Trial

Court afforded the parties a full opportunity to speak to the issues raised and that the Trial Court considered and weighed the competing First Amendment rights of the press and the public against the constitutional right of privacy of the jurors and the Sixth Amendment right of the criminal defendant to a fair trial. And it was only after all issues were fully discussed that an order to partially close the jury *voir dire* was made.

First, there are findings in the record to support the partial closure of the *voir dire* and the refusal to release the transcript. (J.A. 72-122.) These pages reflect the arguments of counsel, with which the trial court agreed: that in the interest of affording the defendant a fair trial before a fair and impartial jury, it was first necessary to afford the prospective jurors a measure of privacy during *voir dire*. As the defense counsel noted on December 30:

> And I can think of several of the people interviewed who are now on the jury who were concerned that what they were telling us about themselves was, in fact, confidential.
>
> One woman I certainly recall said, "I couldn't say these things because there's a lady in the venire who knows my mother, and I would never want my mother to know about this situation."
>
> And I'm sure the Court and counsel can recall numerous other incidents where very intimate details were presented. (J.A. 106.)

After these and other comments were made, the judge stated that he agreed with much of what had been said by the attorneys for the People and the defendant. (J.A. 121.) Certainly this comment by the Trial Court in and of itself, incorporating the remarks of the attorneys, more than satisfies the issue of whether there were findings. Courts have long permitted, and in fact endorsed, the incorporation of

statements from other documents, such as in pleadings. Incorporation would serve the same useful purpose here especially since the reason for requesting findings is so that the public, as well as a reviewing court, will know the grounds on which the order was made. Here, there can be no question but that it is the jurors, right to privacy that is the reason that closure was initiated, and that it was the compelled disclosure of sensitive material during the *voir dire* which prompted the Trial Court to refuse to release the transcripts.

In terms of solutions alternative to closure, it is evident that although the Newspaper argues that there were available alternatives to closure, the Newspaper never indicated or even alluded to just what those alternatives were, either in its written motions or during oral argument. The Trial Court did in fact employ an alternative to total closure of the *voir dire*. The Trial Court allowed public access to the general portion of the *voir dire* and only closed that portion of it which concerned the death-qualification and other special areas. Moreover, a transcript of the *voir dire* was made.[4]

Finally, there can be no question that the Trial Court fully recognized the right of the press and the public to attend the *voir dire*. At the first hearing on October 19, the Trial Court referred to the fact that "the public's right to know should be respected and permitted." (J.A. 87.) And at the December 30 hearing, the Trial Court specifically weighed the competing interests of "the public's right to know"

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[4] In a sense, there are probably no alternatives available to closure other than those applied in the instant case when the jurors' right to privacy is at issue. Just as in *Globe Newspaper*, were the judge to release the transcripts to the press or make them generally available to the public, this would cut against the reason for the closure. (*Id.*, 73 L.Ed.2d at 259.)

against "the right to privacy" and "the right to a fair trial."[5] (J.A. 121.) Indeed, the three motions brought before the Trial Court, accompanied as they were by extensive oral argument, could do nothing but heighten the Trial Court's awareness of the right of access of the public and the press and the constitutional provision in which that right is rooted; the fact that the Trial Court determined that it was outweighed by countervailing rights does not indicate that the First Amendment right was not recognized.

III.

The Trial Court Did Not Violate the Public's First Amendment Right of Access to Criminal Trials by Its Application of *Hovey*.

Given the nature of the alleged crime, the Trial Court anticipated a rather lengthy *voir dire*. Although the *voir dire* here lasted only six weeks, it is not unusual for *voir dire* in sensitive capital cases in California to last as long as six months. Considering the large number of prospective jurors who would, or could, be called, it is a reasonable expectation that if the entire *voir dire* had been open to the public, and the press had reported the proceedings, persons not yet even summoned for jury service could have read newspaper accounts of earlier *voir dire* and have been influenced by them. This, in and of itself, would have violated the underlying philosophy of *Hovey v. Superior Court* (1980) 28 Cal.3d 1, which requires that prospective jurors be seques-

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[5]Amici Society of Professional Journalists, *et al.*, claim that the concern for the jurors' right to privacy is an after-the-fact argument that was not articulated until February 23, 1982. (Br. 23.) However, on October 19, both the District Attorney (J.A. 82) and defendant's attorney (J.A. 85-86) spoke of privacy concerns and the Trial Court noted that the closed *voir dire* would be also as to "any other special areas that counsel may feel some problem with regard to, questioning them in the presence of others . . ." (J.A. 93.) See also record of December 30. (J.A. 121.)

tered from other prospective jurors during *voir dire* on the death-qualifying issue.

Hovey reaffirmed and promoted the right of the criminal defendant to a fair trial before a fair and impartial jury, in part, by the sequestration of the jury during *voir dire* on the death-qualification issue. It is premised on the theory (a) that prospective jurors will be more candid in their responses to *voir dire* if they are examined out of the presence of other prospective jurors, and (b) that prospective jurors tend to be influenced by the responses and comments of other prospective jurors, and thus the need to separate the jurors during that phase of the *voir dire*. The Supreme Court of California felt that sequestration was extremely important because "trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life and death." (*Id.*, 28 Cal.3d at 81.)

The considerations expressed in *Hovey* are most appropriate in their application to the underlying criminal trial. Here, because of the nature of the case, and because of *People v. Williams* (1981) 29 Cal.3d 352, the *voir dire* was necessarily far-ranging, and delved into such personal areas as sexual experiences and feelings, and racial, religious and political attitudes, including inquiries even into the secrecy of the ballot box. In view of the potentially large number of prospective jurors who would be called, and the extensive time which would be required to conduct the *voir dire*, it was clearly foreseeable at the outset that individuals not yet summoned to serve on jury duty could, if precautions were not taken, have read the responses and comments of earlier prospective jurors. Because of the peculiarly sensitive nature of this criminal trial, the exposure of persons not yet called could have defeated the rationale of *Hovey*, with resulting

infringement on the defendant's right to a fair trial.

With the above in the record, it is not surprising that the judge concluded on October 19 that closure was necessary to ensure a fair trial, (J.A. 87) and that he concluded on December 30 that:

> I agree with much of what the defense counsel and People's counsel have said and I also, regardless of the public's right to know, I also feel that's rather difficult that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas that the right to privacy should prevail and a right of the people to know, I think, should have some limitations. (J.A. 121.)

From a review of the entire record, it is clear that the Trial Court followed the procedural requirements of *Richmond Newspapers* and that closure was thereby justified.

IV.

Prospective Jurors in a Criminal Case Have a Constitutional Right to Privacy Which the State has a Legitimate Interest in Protecting During *Voir Dire*.

In what is perhaps the most influential law review article ever written, "The Right to Privacy". (Warren and Brandeis, 4 *Harvard Law Review* 193 (1890)) the concept that a person had a right to be let alone was set forth.[6] Later, Justice Brandeis expanded on his thoughts in his dissenting opinion in *Olmstead* v. *United States* (1928) 277 U.S. 438 at 478 wherein he wrote "The right to be let alone — the

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[6]Perhaps the first reference to the concept of privacy can be found in *Cooley on Torts* (1888) at page 29 where it is written: "The right of one's person may be said to be a right of complete immunity: to be let alone." (See, *Report of the Commission on Personal Privacy* by the State of California Commission on Personal Privacy (December 1982), p. 23.)

most comprehensive of rights and the most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, by whatever means employed, must be deemed a violation." And just six years ago, this Court noted that "the third [right of privacy] is the right of an individual to be free in action, thought, experience, and belief from government intrusion." (*Whalen v. Roe* (1977) 429 U.S. 589, 869 n. 24; see also *Griswold v. Connecticut* (1965) 381 U.S. 479 and *NAACP v. Alabama* (1958) 357 U.S. 449.)

In California, the right to privacy has been explicitly recognized in Article I, §1 of the California Constitution. And this right to privacy has been recognized to be a right held by prospective jurors. (*Report of the Commission on Personal Privacy, supra*, pp. 288-290; see also *Lehman v. City and County of San Francisco* (1978) 80 Cal.App.3d 309.)

Although this Court had not yet dealt specifically with the concept of the juror's right to privacy, this Court's decisions in *Whalen, supra*, and *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, both of which deal with the question of the existence of a constitutionally protected right to privacy and the right to avoid the compelled disclsoure of private matters, have laid down a foundation for the finding of such a right. (*See*, Comment, "*The Right to Privacy of Prospective Jurors During Voir Dire*, 70 Cal.L.Rev. 708 (1982).)

In *Nixon*, this Court defined the privacy right as a "legitimate expectation of privacy" standard, or rather a two-part test as described in Justice Harlan's concurring opinion in *Katz v. United States* (1967) 389 U.S. 347. The first part of this test requires that the individual must have exhibited an actual expectation of privacy; the second part requires that the expectation must be one which society is

prepared to recognize as "reasonable". (*Id.*, 389 U.S. at 361.)

That the prospective jurors here felt and exhibited an actual expectation of privacy is seen in the March 10, 1982 letter from defendant's counsel, wherein he describes his observations of various jurors following the trial. (J.A. 69.) It can also be seen in the argument of counsel on December 30. (J.A. 106, 107, 110-112.) Certainly the atmosphere in which the *voir dire* was conducted, with the prospective jurors sequestered from everyone but the parties litigant, would be conducive to an expectation of privacy, particularly in the minds of prospective jurors who were not otherwise familiar with the law. Their expectations of privacy were those that this Court has already recognized would be preserved and protected.[7]

Because of the way in which *voir dire* developed, it would be unlikely to find historical precedent for the juror's right to privacy. In England, early juries were as much witnesses as juries since they were already acquainted with the facts. (1 W. Holdsworth *A History of English Law* 317 (3d ed. 1922).) And English juries did not lose their character as witnesses until the latter part of the seventeenth century. (1 Holdsworth, *supra*, at 319.) Moreover, *voir dire* examination has traditionally been limited, being conducted only after a challenge had been made, and such challenges were infrequently made. (Moore, *Voir Dire Examination of Jurors; I. The English Practice*, 1 Geo. L. J. 438, 445 (1928); Levit, *Expediting Voir Dire: An Empirical Study*, 44

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[7]See, e.g., *Griwold v. Connecticut* (1965) 381 U.S. 479 [marital privacy]; *NAACP v. Alabama* (1958) 357 U..S. 449 [associational privacy]; *Roe v. Wade* (1973) 410 U.S. 113, *reh. den.* 410 U.S. 959 [marriage and procreation]; *Deerfield Medical Center v. City of Deerfield Beach* (5th Cir. (Unit B) 1981) 661 F.2d 328 [procreation and abortion].

So.Cal.L.Rev. 916, 922 (1971).) And, since the concept of the right to privacy, although one of the penumbral rights of the Constitution, was first expressed a little under 100 years ago, it is not surprising that it has not been part of *voir dire* history.

But there is a strong history of the protection of prospective jurors by trial judges as to matters which might affect the personal privacy of the jurors.

In *Sprouce v. Commonwealth* (1823) 2 Va.Cas. 375, it was held that a prospective juror had a privilege to refuse to answer any question on *voir dire* which would tend to fix infamy or disgrace upon him. In 1897, a Georgia court held that in no event was the trial court bound to ask, or to permit counsel to ask, a prospective juror any question which would tend to incriminate or disgrace him. (*Ryder v. State* (1897) 100 Ga. 528, 28 S.E. 246, 248.) In *Twining v. State* (1964) 198 A.2d 291, a Maryland court disallowed questions tending to disgrace prospective jurors.

More recently, courts have been willing to protect prospective jurors on the basis of a right to privacy when their physical safety was at stake. In *United States v. Barnes* (2d Cir. 1979) 604 F.2d 121 *cert. den.* 446 U.S. 907, the court withheld the names, addresses and ethnic backgrounds of prospective jurors in a criminal trial because of concerns for their physical safety. And in *United States v. Bufalino* (2d Cir. 1978) 576 F.2d 446 *cert. den.* 439 U.S. 928, *voir dire* was conducted outside the presence of everyone, including counsel, because some of the prospective jurors had complained that there were spectators in the courtroom glaring at them and harassing them.

Thus, it can be seen that trial courts have for years been willing, on a case-by-case basis to limit the exposure of

prospective jurors to the public during *voir dire* when the occasion demanded.[8]

Similarly, the closure of portions of the *voir dire* in the criminal trial here and the sealing of the transcript were necessary in order to serve and satisfy compelling governmental interests. The preservation of the confidentiality of the information that the State could otherwise not force prospective jurors to reveal will help preserve our system of criminal trials before fair and impartial jurors. To deny prospective jurors their right of privacy in situations where they are compelled to disclose intimate and sensitive details of their private lives in a public forum is to place them in a most awkward or perhaps even painful situation. To preserve their privacy they might refuse to answer, thus subjecting themselves to contempt proceedings, or worse, they may simply lie. The *Hovey* decision recognized that at least in the area of death-qualification questions, sequestration from other prospective jurors was necessary to obtain candid responses.

In a case such as this one, where questions about sexual matters, politics, race, religion and the secrecy of the ballot box were thoroughly examined by the parties for the protection of the defendant's Sixth Amendment right, complete and candid responses from prospective jurors were mandatory. Thus, the closure of a portion of the *voir dire* dealing with sensitive issues served to protect the defendant's right

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[8]See, *e.g.*, the *California Judge's Bench Book-Civil Trials*, California Center for Judicial Education and Research (1981), §4.19, p. 100. It recommends that when public disclosure of personal information on *voir dire* could seriously damage a juror, the court should use written questions to be reviewed only by counsel and the court. The article states that the written question "thus protects a juror from unnecessary public disclosure and avoids unnecessary exposure of other jurors to this information. A written question may also encourage a juror to disclose an incident that he or she might otherwise conceal in open court." The same could also be said of side-bar conferences which are private and frequently not reported.

as well as to preserve the jurors' right. As *Barnes* noted:

> If Darrowesque questioning of prospective jurors were allowed, namely "religion, politics, social standing, family ties, friends, habits of life and thought", any semblance of juror privacy would have to be sacrificed.

(*Barnes, supra*, 604 F.2d at 143.)

It must also be considered that a prospective juror assigned to serve in a criminal trial encompassing death penalty potential and other highly sensitive issues and another prospective juror assigned to serve in a criminal trial involving a less serious crime and where the *voir dire* will be appreciably less intrusive into the jurors' zones of privacy, creates a legal lottery system in which the private lives of certain jurors are exposed to public scrutiny while other jurors escape such exposure. Jurors should have a standard by which the extent of questions which they may be required to answer in public can be measured, and it should not depend solely on the type of criminal case for which they are summoned. While general questions may be asked, specific questions as to specific feelings and experiences in areas of expected privacy should not be made public. Otherwise, the fundamental right which is sought to be protected, a fair trial for the accused, will be violated.

V.

The Sealing of the Transcript Was Necessary to Preserve and Protect the Privacy Right of All the Jurors.

To close any portion of a criminal trial in order to protect the privacy right of prospective jurors, encourage candor, and thereby ensure the defendant a fair trial, and then later, at a time when the defendant's right to a fair trial is no longer paramount, to release the transcripts of the closed proceedings could, in individual cases, work a substantial hardship on the jury system.

The Newspaper argues that the closure of portions of criminal trials and the non-release of the transcripts will inevitably disturb and erode the public's confidence in our scheme of criminal justice. Yet, a greater potential for erosion of that scheme exists if the transcripts are compelled to be released. It could be potentially more disturbing and work a greater hardship on the jury system if prospective jurors gave testimony about their most intimate and personal lives with the belief that their responses were being held in confidence, and then later discovered that feelings and experiences they would never have otherwise revealed had been exposed because the transcripts were made public.

People v. Williams (1981) 29 Cal.3d 392 allows counsel to ask wide-ranging and deeply-probing questions about very private aspects of peoples' lives. Compelled responses could be embarrassing and could bring disgrace upon the prospective jurors if they became publicly known. Yet, in a practical sense, there is no procedure by which a prospective juror can protect his right to privacy unless that power is reserved to the trial judge.

Simply stated, there is no one in the trial court, except the judge, who is in a position to protect the privacy rights of the prospective jurors. Indeed, while supervising the conduct of the criminal trial in order to ensure a fair trial for the accused, the trial judge also assumes the responsibility, in effect, of acting as legal counsel for all the prospective jurors. And, once the criminal case is concluded, involving very sensitive issues on jury *voir dire*, and the trial court is no longer rquired to protect the defendant's rights to a fair trial, the judge must nonetheless fulfill his obligation to the prospective jurors. The judge must protect the right to privacy of the jurors and thereby perpetuate the even-handed image of government which is inherent in a free society. The refusal of a judge to protect this privacy right could

have a serious effect of deterring citizens from approaching jury service with candor, responsibility and respect for the judicial system. Ultimately, this could destroy the rights of defendants to fair trials.

The sealing and non-release of the transcripts is compelled here because if the benefit sought to be obtained by closure is protection of the privacy right of the jurors, such benefit would be illusory if transcripts of the proceedings were later released to the public. When this Court confronted the question of an automatic closure provision in criminal sex-offense trials during the testimony of minor victims, the Court noted that the Massachusetts rule nonetheless allowed the press access to the transcript of such testimony, and recognized that there were as well other possible sources of accounts of the testimony such as the court personnel.

> Thus, §16A cannot prevent the press from publicizing the substance of a minor victim's testimony, as well as his or her identity. If the Commonwealth's interest in encouraging minor victims to come forward depends on keeping such matters secret, §16A hardly advances that interest in an effective manner. (*Globe Newspaper, supra*, 73 L.Ed.2d at 259.)

Similarly, in the criminal trial in the instant case, the release of the transcripts of the *voir dire* would effectively vitiate the closure and the protection that was afforded the prospective jurors.

This is not to suggest that the sealing and non-release of the transcript is the only alternative if the *voir dire* is itself closed. Rather, it is the recognition that in appropriate cases, when the area of privacy has been invaded upon the reasonable expectation that the responses would remain confidential, and items within the boundaries of this expectation have been the subject of questioning, that the non-release of the transcripts is appropriate. Here, specific references

to incidents in the record were made by the attorneys (see, *e.g.*, J.A. 106 (defense attorney Myers) and 111 (Deputy District Attorney Spitzer) at the December 30 hearing. In the order of February 23, the trial judge stated that "some of the jurors had some special experiences in sensitive areas that do not appear to be appropriate for public discussion." (J.A. 39.) Under the circumstances in this case, the order not to release the transcripts was thus necessary and appropriate.

Finally, it should be remembered that the public is not prohibited from obtaining the information it seeks from the prospective jurors themselves. Once the trial was concluded, the Newspaper could have contacted any of the jurors or prospective jurors who had been summoned. At that time, the holders of the privacy right could have, if each individual had so chosen, revealed any and all information as to what occurred during *voir dire* and what information each individual might have disclosed.

Conclusion.

To be sure, the governmental interest argued here is not compelling with reference to every trial, nor to every criminal trial. But it clearly gathers strength, reaching a level which is patently definable as "compelling" when the criminal trial embraces a set of circumstances which make it foreseeable that prospective jurors will themselves be compelled to disclose information which, if publicly disseminated, could cause hardship, embarrassment and disgrace to individuals who had no choice and were allowed no opportunity to challenge or otherwise prevent such disclosure.

The Newspaper holds itself out in this case not only as a journalistic entity but as a representative of the *public*. The Trial Court in this case is an arm of the criminal justice

system, and responsible to that same *public*. Those who were summoned for jury service in this case to fulfill their civic obligations are the same *public* who are served by both the Newspaper and the Trial Court, and to whom both the Newspaper and the Trial Court are responsible. That responsibility includes being *responsive* to the constitutionally based right of privacy of the *public*.

We do not speak here of the isolated case wherein a private individual is involuntarily catapulted into the public eye by the serendipity of having witnessed or been a party to a newsworthy event. Rather, this case speaks to all of those men and women who are called each year for jury service, and who faithfully respond to that summons.

The paramount question presented is whether those men and women lose their constitutional right to privacy when they are summoned by their government to serve as jurors. The traditional faith of the people of the United States of America in our system of government precludes an affirmative response. Instead, recognition of the jurors' right to privacy produces a fine balance which is responsive to the criminal justice system, the press and the whole of the public. It also allows a trial court on a case-by-case basis to close jury *voir dire* and, where necessary, seal the transcript in accordance with the constitutional safeguards set forth in *Richmond Newspapers* and *Globe Newspaper*. In this way, and to the maximum extent possible, all rights involved are harmonized and preserved.

For the foregoing reasons, the orders of Respondent Court closing the *voir dire* and sealing the transcript should be affirmed.

Respectfully submitted,

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No. 82-556

IN THE

Supreme Court of the United States

October Term, 1982

THE PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, FOR THE COUNTY OF RIVERSIDE,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

REPLY BRIEF OF PETITIONER.

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REPLY BRIEF OF PETITIONER.

ARGUMENT.

I.

THE CONSTITUTIONAL RIGHT OF ACCESS TO THE VOIR DIRE IN CRIMINAL TRIALS CANNOT BE DENIED IN THE ABSENCE OF A COMPELLING GOVERNMENTAL INTEREST.

Respondent concedes that the *voir dire* of prospective jurors is an integral part of criminal trials to which the public and petitioner have a right of access guaranteed by the First Amendment. See *Brief of Respondent*, at 6. This constitutional right of access was violated by the trial court by closing the crucial six weeks of *voir dire* in a capital case and permanently sealing the transcript. See *Globe Newspaper Co. v. Superior Court*, 102 S. Ct. 2613, 2618 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

There is no disagreement between the parties that the closure in the instant case must be examined under the guidelines established by this Court in *Richmond* and reaffirmed in *Globe*. See *Brief of Respondent*, at 7-10. Accordingly, it must be determined that closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." *Globe Newspaper Co. v. Superior Court, supra*, at 2620. In applying this Court's test to the closure of the *voir dire* in a capital case, the Ninth Circuit held that before closure can be utilized the court must make findings, articulated in the record, that: (A) Absent closure, there is a substantial probability of irreparable harm to a compelling interest; (B) no less restrictive alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *United States v. Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982).

The sole disagreement in the instant case is whether the trial court correctly applied the test established by this Court. Respondent fails to cite any substantial evidence in the record that the trial court applied, or even considered, this test before closing the courtroom. Respondent offers no more than random recollections by the attorneys, and asserts, without support, that the trial court adopted their statements in support of closure.

There is no compelling state interest justifying closure articulated on the record. Additionally, the trial court failed completely to consider whether less restrictive alternatives were available. Contrary to respondent's contention, closing six weeks of *voir dire* while allowing access to only three days is hardly a reasonable alternative. Consideration of reasonable alternatives requires consideration of options short of any closure, a duty respondent failed to perform. Finally, the trial court failed to determine whether closure would effectively protect against *any* perceived harm, a require-

ment *Brooklier* found implicit in *Globe*. Without these required findings in the record, the trial court's orders cannot stand.

II.

THERE IS NO COMPELLING INTEREST WARRANTING CLOSURE IN THE INSTANT CASE.

A. The *Hovey* Opinion Is Not Sufficient Justification for Closing the Court and Sealing the Transcript.

Respondent contends that closure in the instant case is justified by the California Supreme Court decision of *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). There are two aspects of *Hovey* to be emphasized in contradiction of this contention.

First, nothing in *Hovey* specifically mandates closing the courtroom to the public at any time or for any purpose. To the contrary, the California Supreme Court expressly stated that *Hovey* "will not in any way affect the open nature of a trial."[1] 28 Cal. 3d at 80-81, 616 P.2d at 1354, 168 Cal. Rptr. at 181. This is acknowledged by the California State Public Defender, appellate counsel in *Hovey:* "If, as petitioner contends, the denial of public access was based on the trial court's 'application' of *Hovey*, that 'application' is unsupported by anything in the *Hovey* opinion and is erroneous." *Brief of Amicus California State Public Defender*, at 10.

Second, if *Hovey* is interpreted to require closure of the courtroom to the public, it suffers from the same constitutional infirmity as the statute struck down by this Court

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[1]Despite this explicit language, trial courts continue to interpret *Hovey* to require court closure. Since the filing of Petitioner's brief, *voir dire* has been closed and the transcripts sealed in two additional capital cases in Riverside County alone. See, *People v. King*, Riverside Superior Court Case No. CR 19971; *People v. Daniels*, Riverside Superior Court Case No. CR 19711.

in *Globe*. *Per se* rules of trial closure, be they mandated by the legislatures or by the courts, are equally unconstitutional.[2]

B. No Alleged Right of Juror Privacy Justifies Closing the Courtroom and Sealing the Transcript.

Respondent contends also that closure can be justified as necessary to protect prospective jurors' rights of privacy. This contention is not supported by the facts of this case, nor by existing law. Respondent's argument that juror privacy constitutes a compelling interest invoked by the trial court to support closure is belied by the absence of any showing that closure would effectively protect against the perceived harm. The issue of juror privacy is not before the court.

Closure was initially based on an erroneous interpretation of *Hovey* and an unsupported notion that closure was necessary to protect the defendant's right to a fair trial. At the conclusion of the critical six weeks of *voir dire*, the trial court attempted to justify sealing the transcript of the closed proceeding by creating and applying a previously unrecognized right of juror privacy. This *post hoc* rationalization does not rise to the level of a compelling governmental interest necessitating closure. Further, there was no determination by the trial court that less intrusive alternatives to closure were unavailable.

Assuming, *arguendo*, that *voir dire* included inquiries involving possible privacy rights of jurors, the trial court

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[2]Nor is the impact of *Hovey* on the constitutional right of access any longer limited to California. The Kentucky Supreme Court recently interpretated *Hovey* as requiring court closure, even though conceding such interpretation may well render it unconstitutional in light of *Globe*. *The Lexington Herald-Leader Company, Inc. v. Meigs*, and companion cases, 83-SC-218-TRG, 83-SC-214-TRG, 83-SC-215-TRG, August 31, 1983.

failed to consider less intrusive alternatives to closure. Since disclosure of personal matters should only be compelled when information obtained would shed light on the individual's ability to be impartial and fair, the court must consider any privacy interests of the venire persons before permitting such inquiries. If a potential juror has an expectation of privacy which arguably conflicts with a defendant's right to a fair trial, the court must attempt to balance the juror's and defendant's competing interests before the question is asked. It is *at that time* that the court must consider and, where appropriate, invoke any of the numerous alternatives that would adequately protect any expectation of privacy a prospective juror may have. These alternatives include using juror questionnaires to pinpoint any possible privacy problems; screening questions which will be asked during voir dire; rephrasing questions to minimize the intrusion upon the juror's personal affairs; providing prospective jurors with numbers, thereby withholding their identities until the jury is impaneled; and excusing jurors who decline to provide intimate information. Denying the public its constitutional right of access is not a valid alternative.[3] See, *e.g.*, *United States v. Layton*, 519 F. Supp. 959 (N.D. Cal. 1981); *United States v. Barnes*, 604 F.2d 121 (2d Cir.), *cert denied*, 446 U.S. 907 (1979); Comment, *The Right of Privacy of Prospective Jurors During Voir Dire*, 70 Calif. L. Rev. 708 (1982); Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*, 93 Harv. L. Rev. 782 (1980).

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[3]The fact that closing the courtroom to protect privacy interests of the jurors is not a valid alternative can actually be supported by each of the cases cited by respondent, in that, in each such case, the court limited the *voir dire* questioning, not the public's access rights. See, *e.g.*, *Sprouce v. Commonwealth*, 2 Va. Cas. 375 (1823); *Ryder v. State*, 100 Ga. 528, 28 S.E. 246 (1897); *Twining v. State*, 198 A.2d 291 (1964).

In the last analysis, this so-called "juror right of privacy" invoked by respondent does not rise to the level of a compelling interest that can outweigh the constitutional right of access. To the contrary, this Court has recognized that any right of privacy can be limited or circumscribed by compelling governmental interests or by competing constitutional rights. See, *e.g.*, *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977); *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975).

If the information sought from the potential juror does not reflect on his ability to be fair and impartial, then neither the defendant nor the public is entitled to the information. Any intrusion upon a prospective juror's expectation of privacy occurs, if at all, at the time the court compels him to answer, regardless of whether the courtroom is open or closed. Once the court determines that any privacy interest a juror might have is outweighed by the defendant's right to a fair trial, the information revealed becomes a matter of legitimate public interest and public access cannot be denied.

This Court has determined that "the commission of crime, prosecutions resulting from it, and judicial proceedings arising from prosecutions, however, are, without question, matters of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government." *Cox Broadcasting Corporation v. Cohn*, *supra*, 420 U.S. at 492. Information bearing on the jury selection process and the qualifications of the trier of fact, especially in a capital case, is crucial to a complete understanding of the criminal justice system and, therefore, is a matter of legitimate public interest. No theory of juror privacy justifies the denial of such information to the public in the instant case.

CONCLUSION.

Denial of the constitutional right of access to criminal trials cannot stand in the absence of a compelling governmental interest and in the absence of a showing that less restrictive alternatives are unavailable. In the instant case respondent cites the California Supreme Court decision in *Hovey v. Superior Court* and suggests an unrecognized "right of juror privacy" in an effort to support the trial court's orders. Respondent inevitably fails, however, to bring forth any evidence to support its contention that the trial court on the record identified either of these interests as so compelling as to overcome the First Amendment rights involved. Respondent further fails to demonstrate through the record that the trial court considered and rejected less restrictive alternatives to closure. The trial court's failure to make specific findings, articulated in the record, compels a determination by this Court that the orders herein wrongly denied the constitutional right of access.

Respectfully submitted,

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Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

vs.

ALBERT GREENWOOD BROWN, JR.,
Defendant.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION TWO.

BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE AND CONSENT

Joseph Peter Myers was, by appointment of the Respondent Court, counsel for Defendant, Albert Greenwood Brown, Jr., through his trial on charges of murder and rape. Special circumstances were alleged in the Information, and the Plaintiff sought the penalty of death in the proceedings.

In large part due to the insistence of trial counsel for both parties, the Respondent Court barred the press and public from certain portions of the jury selection process. Amicus herein sought to protect the rights of the Defendant to a fair trail and due process of law, as well as the effective assistance of counsel, and to preserve the ability to select a fair and impartial jury panel in a case in which the most serious and emotional of issues were presented — the rape and strangulation killing of a fifteen year old white schoolgirl on her way to school, by a black man twenty-six years of age, with a prior conviction of forcible rape on an adolescent caucasian girl. Amicus insisted that jurors who were to be questioned in these most sensitive of areas, particularly as their feelings would be involved in the imposition of the alternative penalties of death or life imprisonment without possibility of parole, could not do so honestly, or without substantial invasions of their privacy, in the absence of an order closing the proceedings. Amicus was joined in such requests, at every instance, by the Deputy District Attorney for the County of Riverside who prosecuted the action.

There being no national organizations of potential jurors, and having a direct interest in the resolution of the issues before this Court, Amicus submits this brief.

Written consent to the filing of this brief has been given by counsel for petitioner and respondent, respectively, and accompanies the brief.

ARGUMENT

Because this brief is intended to be extremely limited in length, a Summary of argument is omitted. It is the purpose of Amicus Curiae herein to present the philosophical and practical problems facing trial counsel and veniremen and women placed into the cauldron of publicity which accompanies cases such as this one, and the reasoning, accepted by Respondent Court, which so clearly justifies the orders which this Court will review. In making such statements, certain arguments presented by others in support of the Petitioner's position will be discussed as well.

A. Historical considerations do not support Petitioner's position.

While historical search for the origins of the jury system and the processes of jury selection is interesting, it necessarily ignores the difficulties posed by modern communications media as these intrude into the ancient system that criminal trials represent. What Petitioner and *Amici* in its support ignore is the simple fact that an individual citizen who becomes involved as a prospective juror in a serious criminal trial has no choice but to follow the directives of the Court. At the same time, such a citizen should not have to be deprived of all privacy rights, or risk the exposure of his or her most intimate feelings and experiences to broad segments of the public who have no need for such information. In California, as shown in other briefs filed herein, such questioning is virtually unlimited in scope, and even the request of a potential juror to avoid answering a question put by the Court or counsel, or to make his own request for a private hearing, could focus extreme public attention upon that individual.

Even though these considerations undoubtedly existed historically within smaller communities, or even large urban centers, modern broadcast and print media have the capacity to disseminate information virtually instantaneously to our entire society. And, while Petitioner is conceded to be a newspaper which behaves responsibly, First Amendment

considerations would preclude any Court from selectively barring access to jury selection proceedings, or trials, to particular reporters or news gatherers based upon a perceived "responsibility" factor. Thus, newspapers dealing far more with the seamy sides of modern life, often with little regard for accuracy or propriety, would be invited to share in the intimate feelings of veniremen, and to report their experiences, simply because they might tittilate their audience. Even if such conduct is allowed with public figures as the subject matter, it ought not to be permitted when ordinary citizens are called to be examined as prospective jurors.

B. Recent instances cited by *Amici* do not support opening jury selection.

It is interesting to note that the Amicus Curiae brief of the Society of Professional Journalists, Sigma Delta Chi, et al., prepared by Mr. Bruce W. Sanford, at pp 20-21, discusses "public confidence" in the administration of justice in connection with the trial of John W. Hinckley, Jr., and notes that the revelation of jurors' relatives who had been confined to mental hospitals had disturbed the reading public. Perhaps. Yet, the United States Attorney prosecuting Mr. Hinckley and Mr. Hinckley's counsel each understood clearly the issues in that case. Potential jurors, too, were apprised of the insanity defense. How could either party to that trial have expected jurors to reveal such "skeletons in their closets" if the proceeding had not been closed? Truthful answers to voir dire questioning on that particular subject matter — personal acquaintance with persons having emotional or mental problems — was absolutely essential in connection with that trial. Had such proceedings been open, it is obvious that potential jurors, faced with the certainty of national publicity of their own family tragedies and difficulties, would not have been able to fulfill their duties and their oaths. And the harm of allowing access to the transcripts of jury selection subsequent to the trial is surely shown by the apparent reaction

of the public to the news accounts. That reaction included hostility to the jurors involved. We expect jurors to be judges of the facts, and to apply often complex laws. We cannot forget that they are human beings.

The administration of justice cannot function in the dark. The development of a rule of access to jury selection proceedings, regardless of the pain or deprivation of rights of privacy to citizen-jurors, could only serve to drive the most intimate, and the most relevant, feelings and concerns of potential jurors even further from the light. Regardless of "public perception" of the fairness of a trial, an accused cannot possibly have a fair trial, or due process, or the effective help of an attorney, where public access to jury selection would itself subvert that process and virtually force potential jurors to hide or distort the truth about their experiences and opinions.

C. Respondent Court did articulate findings in support of the closure of jury selection.

On May 17, 1983, in a hearing requested by the Attorney General of the State of California, Respondent Court further articulated the reasons and findings which supported the orders Petitioners complain of. Unfortunately, the record of that hearing is not yet corrected. Hopefully, Counsel for Petitioner and Respondent will supplement the record in these proceedings with a corrected record. However, Respondent Court did indicate that there was a substantial probability of irreparable harm to a compelling interest, viz., the rights of the Defendant as well as the rights of privacy of the jury panel. Respondent Court held that hearings suggested by Counsel for Defendant inquiring of prospective and seated jurors as to their desires for confidentiality would be too burdensome. Finally, it was clear that the jurors' feelings and experiences, and situations revealed to both prosecutor and defense counsel during the selection process, were entitled to privacy.

With regard to the last point, Amicus represents, as a Member of the Bar of this Court, that a number of female jurors revealed that they were victims of sexual abuse, and that there had been a claim within one family of an interracial rape, and these issues were carefully probed. Other jurors dealt with intimate feelings about race and sex, as well as their religious and political preferences and ideas. Still others deal with gruesome photographs which were to be introduced as evidence in the trial. Obviously, at a time when the popularity of the death penalty is ever-increasing, jurors were asked about that issue — and those who believed in non-imposition of such a penalty did not have to face public revelation of that now unpopular stance.

CONCLUSION

The effort of Petitioner and Amici Curiae in its support, ostensibly to "preserve" the jury selection process, is based upon a rejection of one of the most obvious traits of human beings — that they desire and need privacy. If jurors must choose between preserving their own rights and the protection of their families from potentially disastrous publicity, and the rights of a defendant or the prosecution to know their views, that choice may destroy the integrity of the jury sytem. It is useless to exchange some potential and slight increase in public approval of the jury system for the right of access, by the parties to the action, to the information so vital to their interests. For these reasons, Amicus Curiae respectfully urges that the decision below be upheld.

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Respondent.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

ALBERT GREENWOOD BROWN, JR.

Defendant.

BRIEF OF AMICUS CURIAE THE STATE OF CALIFORNIA

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BRIEF OF AMICUS CURIAE THE STATE OF CALIFORNIA

INTEREST OF AMICUS CURIAE

The People of the State of California are the party plaintiffs in

all criminal actions prosecuted in California courts, and respondent on appeals from judgments of conviction rendered in those actions. The issues presented in this case are connected with jury selection in the case of The People of the State of California v. Albert Greenwood Brown, Jr. The defendant in that case was sentenced to death, and his automatic appeal is now pending before the Supreme Court of California.

It is of vital interest to the State of California that in all California criminal trials the right of each party to a fair trial is protected without infringing on the constitutionally protected rights of the press, the public in general or individual persons. The issues presented in this case involve a balancing of those rights.

SUMMARY OF ARGUMENT

This Court has recognized a First Amendment right of the general public and the press to have access to criminal trials. (Globe Newspaper Co. v. Superior Court (1982) ___ U.S. ___, 73 L.Ed.2d 248.) That right, however, is not absolute and must be weighed against other interests such as the right of the defendant and the People to a fair trial.

A trial court's decision to restrict public access must be articulated in findings which acknowledge the interests involved. The closure must take alternative solutions into consideration and be as limited as possible. Interested parties should be given a right to be heard.

This procedure for limited closure applies to jury selection in

criminal cases with consideration given to factors which affect obtaining a fair and impartial jury.

Where portions of a voir dire have been closed, transcripts of the proceedings should be made public when the reasons for closure no longer outweigh other interests.

In this case, the trial court's orders closing the majority of voir dire and denying public access to the transcripts were overbroad. Absent articulated findings on the record no justification is stated for denying public access to all of the transcript of the closed voir dire proceedings.

On the other hand, our partial review of the transcript of the closed voir dire proceedings gives rise to the belief there is a possibility that a limited closure was proper. In light of

that, amicus urges that the proper remedy is a remand to the trial court to order the entire transcript released, or as much of it as possible, excepting from release only such portions as where the trial court can provide articulated findings justifying closure.

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ARGUMENT

I

EXCLUSION OF THE PUBLIC FROM JURY SELECTION SHOULD BE LIMITED AND DETERMINED BY BALANCING THE INTERESTS INVOLVED

This Court's recent decisions in Globe Newspaper Co. v. Superior Court (1982) ___ U.S. ___, 73 L.Ed.2d 248, and Richmond Newspapers, Inc. v. Virginia (1980) 448 U.S. 555, have firmly established that the press and general public have a constitutional right of access to criminal trials. This right of access is embodied in the First Amendment and applied to the states through the Fourteenth Amendment. (Globe Newspaper Co. v. Superior Court,, supra, ___ U.S. ___, 73 L.Ed.2d at p. 255.)

Although this right of access to criminal trials is of constitutional

stature it is not absolute. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 257.)

In the present case the request for closure was made by a criminal defendant on the basis that opening the proceedings would interfere with his right to a fair trial. The question presented here, therefore, is how to decide which of these important rights should give way and what procedure should be used in reaching that determination.

In Gannet Co. v. DePasquale (1978) 443 U.S. 368, this Court, while not yet recognizing a First and Fourteenth Amendment right to attend criminal trials, assumed arguendo such a right existed. Under this assumption, it was held the trial court's weighing of the defendant's rights against the right of public

access was properly based on an assessment of the competing societal interests involved.[1] The ruling by the trial court was that the public could be excluded from the suppression hearing because an open proceeding would pose a reasonable probability of prejudice to the defendants. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 392-393.)

Although a criminal defendant has a Sixth Amendment right to a public trial there is no right to compel a private trial. (Id., at p. 382.) Thus,

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1. Trial courts now must recognize the constitutional right for the public or press to attend criminal trials and representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 25; Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at p. 581, (plurality opinion).)

the burden should be on a criminal defendant to show an open proceeding would pose a reasonable probability of prejudice to his right to a fair trial.

Given the importance of public trials, however, any closure should be as limited as possible while still protecting the defendant's rights. In addition to balancing the interests of the parties, the trial court must examine alternative solutions which would meet the need to ensure fairness.[2/] (Richmond Newspapers, Inc. v. Virginia, supra, 448 U.S. at pp. 580-581.)

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2. In addition to the interests of the defendant and the press or public, the interests of the state may also compel closure. Closure by the state is justified only when necessitated by a compelling governmental interest narrowly tailored to serve that interest. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 257.) In some situations it is possible the interests of the state may be added

A final requirement for closure of a criminal trial is articulated findings which are necessary for review.[3/]

In applying the general principle established by this Court to voir dire proceedings several other factors

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to the interests of the defendant, with those combined interests outweighing the public right to an open hearing.

3. Among the troubling procedural aspects of the present case is the fact the trial court's findings were never provided to the California Court of Appeal or the California Supreme Court when they were requested to review the closure. In addition, the petition for writ of mandate requesting opening of the voir dire was not filed until the conclusion of trial when the issue was moot on its face, and the request to order the trial court to release the transcript of the voir dire was filed in the California Court of Appeal although death penalty cases are appealed directly to the California Supreme Court. (Cal. Const., art. 6, § 11.) For the above reasons the denial of the petition for writ of mandate and the refusal of the California Supreme Court to hear the matter, both without opinion, may have been based entirely on state procedural grounds.

require consideration in the balancing process. There is some question as to whether the logic of Globe setting forth reasons for open trials applies to voir dire proceedings. In United States v. Brooklier (9th Cir. 1982) 685 F.2d 1162, it was held voir dire is a part of trial and governed by Globe. This holding is not challenged herein. However, to the extent a weighing or balancing process is involved, the right of the public or press to attend voir dire proceedings would be of somewhat less importance than the right to attend the evidentiary portion of the trial. It should also be noted that unlike the adversary method of determining the truth through direct and cross-examination of witnesses at

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trial[4] both parties need to assure, if possible, that potential jurors are both truthful and candid in their responses to questions. As such the atmosphere during voir dire should be conducive to facilitating this need.

An example of a reasonable limited closure of voir dire could take place in a rape case. A potential juror might hesitate to acknowledge to counsel that she or her minor child had previously been sexually assaulted if this fact, hitherto unrevealed were to be reported in the community newspaper. Obviously, questioning in this situation should be conducted in camera at the request of the juror. This Court has

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4. This Court has recognized that, as a general matter, openness in court proceedings may improve the quality of testimony. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 26.)

acknowledged the traditional right of trial courts to conduct in camera conferences in the exercise of judicial discretion. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259, n. 25.) Although this type of limited closure could be phrased in terms of protecting the juror's right to privacy it is more properly considered as another aspect of insuring a fair trial for both the defendant and the state.

Another type of situation when limited closure would be appropriate would be where the publicity from reporting voir dire might prejudice other potential jurors not yet cautioned to avoid reading about the proceedings. In California, when the death penalty is a possible punishment, voir dire is an extensive procedure. Counsel for the

defendant(s) are each allowed 26 peremptory challenges as opposed to 10 in a normal felony trial. In addition, voir dire of individual jurors is to be done individually and in sequestration. (Hovey v. Superior Court (1980) 28 Cal.3d 1.)[5/] This process resulted in a jury selection process of over six weeks in the present case and lengths of six months are not uncommon in other death penalty cases. As a practical matter the entire jury pool cannot be selected at one time in many instances. In these cases potential jurors might become prejudiced by continuing news

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5. Although Hovey requires jurors to be questioned individually and in sequestration there are no California cases that interpret this holding to require exclusion of the press or public from the proceedings. The record does not reflect the trial judge in the present case based his decision to close the voir dire of the jury on the authority of Hovey.

reports prior to being advised to avoid them. In small jurisdictions pretrial publicity might so taint the potential jury pool that changes of venue would be inevitable.

Situations are also readily forseeable where one potential juror would have personal information about witnesses or the case which might prejudice other jurors. If this information were revealed to other jurors in open voir dire or through newspaper reports unnecessary exclusion would result making jury selection even more difficult.

The above examples are related simply to note that circumstances exist during voir dire which could require limited closure. As in situations arising during the evidentiary portion of the trial, closure should be done on

a case by case basis. The factors that should be weighed in the balancing process are the interests of the defendant, the state and the public/press. An opportunity to be heard should be available to all parties. Alternative methods to avoid closure should be sought and any closure should be as limited as possible while still protecting the interests involved. Finally, any closure should be supported by articulated findings stating the overriding interest that requires the press and public be excluded.

II

TRANSCRIPTS OF CLOSED VOIR DIRE PROCEEDINGS SHOULD BE MADE PUBLIC WHEN THE REASON FOR CLOSURE NO LONGER OUTWEIGHS OTHER INTERESTS

Since limited situations exist where voir dire proceedings are closed

to the public the question arises as to when the record should be made public.

Transcripts of voir dire proceedings closed to the public should be released as soon as possible without compromising the interests which required the closure. The First Amendment rights of the public which may have to give way to other overriding interests are still held on the balance beam and when the weight of the interest on the other side diminishes the balance tilts in favor of the public's rights. Indeed, this Court noted in Gannet Co. that one reason closure was proper was because the denial of access was not absolute. A transcript of the proceedings was made available once the danger of prejudice had dissipated. (Gannet Co. v. DePasquale, supra, 443 U.S. at p. 393.)

In the context of voir dire proceedings, if the reasons for closure involve maintaining the integrity of the jury panel, the transcripts should generally be released when the jury is impaneled or, at the latest, the conclusion of trial. The possibility exists, however, that in rare instances the interests involved may require that portions of a closed proceeding not be released to the public. In Globe this Court, in acknowledging the possibility that portions of a trial could be closed if strict standards were met, noted that a decision to release some such transcripts would be illogical and lack common sense. (Globe Newspaper Co. v. Superior Court, supra, ___ U.S. ___, 73 L.Ed.2d at p. 259.) Obviously, if a reason for closure is compelling and overrides the other interests involved

the test must be continued into the future where challenges may be raised when circumstances change. For example, under the facts of Globe, the state's compelling interest in safeguarding the physical and psychological well being of minors who had been sexually abused would cease once the minors' well-being would no longer be affected by release of the information. The balancing factors set forth, supra, would continue to weigh.

Furthermore, additional interests would have to be considered. While a portion of the transcript of a criminal trial might be denied to the public in general, it would be necessary for the review of the criminal proceedings that the reviewing court and counsel for the parties be allowed access to all portions of the trial.

In instances where portions of a transcript should not be released or release should be restricted because of an overriding interest, the trial court should articulate both the specific restrictions on release and the findings supporting those restrictions at time the proceedings are ordered closed to the public.

In this case, the trial court's orders closing the majority of voir dire and denying public access to the transcripts were overbroad. Absent articulated findings on the record no justification is stated for denying public access to all of the transcript of the closed voir dire proceedings.

On the other hand, our partial review of the transcript of the closed voir dire proceedings gives rise to the belief there is a possibility that a

limited closure was proper. In light of that, amicus urges that the proper remedy is a remand to the trial court to order the entire transcript released, or as much of it as possible, excepting from release only such portions as where the trial court can provide articulated findings justifying closure.

CONCLUSION

The importance of open trials requires that any closure of voir dire in criminal proceedings be as limited as possible. The balancing of the interests involved is a continuing process and

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transcripts of closed proceedings should be made public when the reasons for closure no longer exist.

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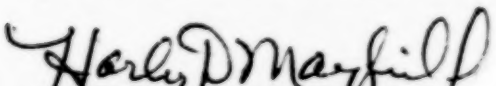

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Defendant.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA,
Fourth Appellate District, Division Two

BRIEF AMICUS CURIAE OF THE CALIFORNIA STATE PUBLIC DEFENDER

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BRIEF AMICUS CURIAE OF THE CALIFORNIA STATE PUBLIC DEFENDER

Interest of Amicus Curiae and Consent

The California State Public Defender is a state agency with primary responsibility for the representation on appeal of indigent criminal defendants. (Cal. Govt. Code, § 15421, subd. (a).) California Government Code section 15423 authorizes the State Public Defender to

appear as a friend of the court. We currently represent 31 capital defendants whose automatic appeals are pending before the California Supreme Court (Cal. Pen. Code, § 1239 subd. (b)), including Albert Greenwood Brown, Jr., the defendant in the criminal proceeding from which the instant matter arises. (Cal. Crim. No. 22501.) Of particular relevance to this case, the California State Public Defender was counsel in *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), in which the California Supreme Court, exercising its supervisory authority over state criminal procedure, promulgated a rule requiring sequestration of the death-qualification [1] portion of jury selection in capital cases. (*Id.,* at 80.)

The jury selection procedure that was ordered in *Hovey* has provided substantial benefits to all parties in capital trials in California. The Petition for Writ of Certiorari and Brief in Opposition filed by the parties herein suggest that the *Hovey* rule [2] is, at least potentially, in conflict with the First Amendment interests of the press and the public to have access to all phases of capital prosecutions. This is not so. The *Hovey* rule—a state-law rule of criminal procedure—is not implicated in this dispute one way or the other. The trial court rulings at issue here did not apply *Hovey* and were not based on *Hovey.*

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[1] "Death-qualification" refers to the process in "any capital case [in] which prospective jurors [are] excluded for cause because of their attitudes toward the death penalty." (*Hovey* v. *Superior Court, supra,* 28 Cal.3d at 16, fn. 34.)

[2] Although the *Hovey* decision discussed several aspects of the death-qualification process, that portion of the decision requiring sequestered voir dire in capital cases will be referred to in this brief as the "*Hovey* rule."

The interest of the California State Public Defender is to assist in framing the scope of the issues involved in this case. Rather than commenting on the merit of the ultimate question presented, this brief is presented pursuant to rule 36 of the Rules of the Supreme Court of the United States "in support of neither party."

Written consent to the filing of this brief has been given by counsel for petitioner and respondent, respectively, and accompanies the brief.

Summary of Argument

In *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), the California Supreme Court ordered that in future capital cases (1) the "portion of the voir dire of each prospective juror which deals with issues which involve death-qualif[ication]" be conducted (2) while each juror is "outside the presence of their fellow venirepersons." (*Id.,* at 80–81.) In the case at bench, reporters employed by petitioner Press-Enterprise were prevented from attending (and subsequently denied access to transcripts of) the entire voir dire.

Petitioner claims that the denial of media access was attributable, at least in part, to the respondent trial court's application of the sequestered voir dire rule of *Hovey,* and that such denial violated its First Amendment right of access to public trials. Respondent counters that its decision complied with the *Hovey* rationale, and that the denial of access was appropriate. In fact, both parties have mischaracterized the issue presented.

Respondent trial court's rulings did not constitute applications of *Hovey,* but rather embodied notions of ju-

ror privacy apart from the *Hovey* rationale. Moreover, assuming arguendo that the trial court intended to base all or part of its rulings on *Hovey,* such "applications" were erroneous, for *Hovey* speaks solely of sequestration of venirepersons *from one another* during the death-qualification process, and does not require or suggest that third parties be excluded. There is no conflict, actual or potential, between the *Hovey* rule and the First Amendment.

Argument

THERE IS NO CONFLICT, ACTUAL OR POTENTIAL, BETWEEN THE REQUIREMENT IN *HOVEY* THAT DEATH-QUALIFYING VOIR DIRE IN CALIFORNIA CAPITAL CASES BE SEQUESTERED, AND THE FIRST AMENDMENT RIGHT OF THE PRESS AND PUBLIC TO ATTEND CAPITAL TRIALS

The California Supreme Court's opinion in *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980), is primarily devoted to the constitutional propriety of "death-qualifying" capital jurors prior to their determination of guilt or innocence. (*Id.,* at 1-69.) The court concluded, however, that this issue was not ripe for determination. (*Id.,* at 68–69.)[3] In addition, the court announced a new rule of criminal procedure, under its "supervisory authority over California criminal procedure" (*id.,* at 80; fn. omitted): "in future capital cases that portion of the voir dire

[3] A short summary of the *Hovey* opinion and of its legal context is included as an Appendix to this brief.

of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." (*Ibid.;* fn. omitted.)

This rule of sequestered voir dire was not in dispute in *Hovey;* in fact, "the [California] Attorney General indicated in oral argument that he had 'no objection' [to the rule.] . . . ." (*Id.,* at 80.) The Attorney General noted that sequestration had previously been employed in California cases in which a high degree of pretrial publicity made it preferable to individually voir dire the prospective jurors on their exposure to the publicity in order to avoid contaminating the remaining group of prospective jurors. Sequestered voir dire has proved to be very useful to the courts and to all parties to capital trials in California. The parties to this case—a newspaper and a trial court—now contend that the *Hovey* rule may conflict with the First Amendment, and that its benefits must be balanced against the constitutional harm of excluding the public from capital trials. As amicus will demonstrate, this is not so.

A. *The Hovey Rule Was Not the Basis for Denying the Petitioner Access to the Voir Dire in This Case*

Two issues are raised by the petitioner in this case: (1) Does exclusion of the public from voir dire proceedings in capital cases violate the First Amendment as interpreted by this Court in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980)?; (2) Has the public been denied its constitutional right to attend criminal proceedings through the *application* of *Hovey* v. *Superior Court,* 28 Cal.3d 1 (1980)?

The trial court record, however, reveals a controversy as to the first of these two issues only. Petitioner's written presentations in the two motions and one ex parte application made in the trial court did include arguments that *Hovey* should not be applied to preclude media access. But nowhere in the minute orders denying such motions and application, or in the one transcript available of hearing thereon, is there any indication that the trial court's rulings were predicated on *Hovey* or constituted an "application" thereof. For example, in denying petitioner's motion of December 30, 1981, the trial court stated:

> ". . . I also feel . . . that by a person performing their civic duty as a prospective juror putting their private information as open to the public which I just think there is certain areas [*sic*] that the right to privacy [4] should prevail and a right to a fair trial should prevail and the right of people to know, I think, should have some limitations . . . ." (Reporter's Transcript, page 3990, lines 1–7.)

In its minute order of February 23, 1982, denying petitioner's post-trial ex parte application, the trial court ruled:

> "The jurors were questioned in private relating to past experiences, and while most of the information is dull and boring, some of the jurors had some spe-

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[4] In its Petition for Writ of Certiorari, petitioner notes that during the course of oral argument which resulted in this ruling, counsel for defendant Brown and counsel for the People of the State of California stated that "there was some type of implied agreement between the court and the jurors assuring the latter of the permanent confidentiality of their voir dire examination." (Petn. for Cert. at p. 4.)

cial experiences in sensitive areas that do not appear to be appropriate for public discussion."

It is apparent that the only real controversy in this case is the one noted above as the first issue presented—did denial of media access violate the First Amendment as interpreted in *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555 (1980)? In *Richmond,* this Court held, "Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." (*Id.,* at 581; fn. omitted.) Amicus takes no position on whether "an overriding interest articulated in findings" has been demonstrated in this case.[5] We emphasize, however, that resolution of this issue does not implicate the sequestered voir dire rule of *Hovey.*[6]

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[5] We also take no position on whether the privacy rights of prospective jurors provided such an overriding interest. We can, however, contemplate situations where the nature of the charges are such that effective voir dire will be seriously impaired unless prospective jurors are assured that their candid responses are to remain confidential. In such cases the protection of the defendant's Sixth Amendment right to a fair trial would provide the overriding interest justifying the exclusion of the press and public from portions of the voir dire.

[6] Although the Petition for Writ of Certiorari characterizes petitioner's failure to gain relief in the California Court of Appeal and Supreme Court as "tacit approval" of the "lower court's original order sealing the transcript" (Petn. for Cert. at p. 15), it would be incorrect to view this lack of success as constituting a California appellate pronouncement on *Hovey,* or any other issue. (Indeed, petitioner does not claim that the alleged "tacit approval" was predicated on *Hovey.*) The petition for writ of mandate to the Court of Appeal was denied without issuance of an alternative writ or order to show cause, or any comment thereon. Since many possible grounds exist for such a denial, California courts do not consider it a ruling on the merits; like denials of certiorari by this Court, they have no precedential value. (See *Richer* v. *Superior Court,* 63 Cal.App.3d 748, 755–756 (1976).)

B. *To the Extent the Trial Court May Have Purported to "Apply" the Hovey Rule, Such "Application" Was Erroneous*

In *Hovey,* the California Supreme Court described in great detail the basis for its ruling on sequestered voir dire. The court began by noting Mr. Hovey's contention that death-qualification "create[s] in the minds of jurors certain expectations unfavorable to the accused and predispose[s] the jurors to receive and interpret evidence in ways favorable to the prosecution." (*Hovey* v. *Superior Court, supra,* 28 Cal. 3d at 69; fn. omitted.) The court discussed several reasons which lead it to anticipate that death-qualification would "have an impact on the expectations, perceptions, attitudes, and behavior at trial" on the prospective jurors. (*Id.,* at 70.)

> "In a typical death-qualifying voir dire, the judge and the attorneys repeatedly instruct the jurors about the steps leading to the penalty trial and question each prospective juror, oftentimes at considerable length, concerning his or her attitudes about capital punishment. These repeated displays of concern about the death penalty before any evidence of guilt has been presented may prompt the jurors to infer that the court and counsel assume that the penalty trial will occur." (*Id.,* at 70–71.)

This inference on the part of the jurors may encourage them to vote for guilt, independently of the evidence. (*Id.,* at 71.)

In addition to the risk that the likelihood of votes for *conviction* will be improperly increased because the jurors expect that a penalty trial will occur, the *Hovey* court determined that death-qualification in the presence of other venirepersons also creates a risk that the likelihood of votes for the *death penalty* will be improp-

erly increased. Prospective jurors who see that their fellow venirepersons are excluded when they express opposition to the death penalty may interpret such exclusion "as an indication that the judge in particular and the law in general disapprove of such [anti-death penalty] attitudes." (*Id.*, at 74.) Moreover, voir dire in the presence of the whole panel repeatedly prompts the prospective jurors who are not being questioned to think about the penalty decision they may later be called upon to make. This stimulus may desensitize a prospective juror so that "[w]hat was initially regarded as an onerous choice, inspiring caution and hesitation, may be more readily undertaken simply because of the repeated exposure to the idea of taking a life." (*Id.*, at 75.)

Concerned that the possible "pernicious consequences of [then] current voir dire procedures in capital cases" constitute a "threat . . . to an accused's constitutionally protected interests in a fair trial" (*Id.*, at 79), the California Supreme Court concluded that "[t]he most practical and effective procedure available to minimize the untoward effects of death-qualification is individualized sequestered voir dire." (*Id.*, at 80.)

The primary justification for the rule was that "each individual juror would be exposed to considerably less discussion and questioning about various aspects of the penalty phase before hearing any evidence of guilt." (*Ibid.*) The court did note that since "jurors will be insulated from the influences which the voir dire of their fellow venirepersons may exert . . . [they] may also be more forthright and revealing in their responses." (*Id.*, at 80, fn. 134.) But the court only required that the voir dire be "outside the presence of the other members of the panel" (*ibid.*; see also *id.*, at 81), not outside the presence of the press and public. Lest it be misunder-

stood, the court was careful to note that its "*rule will not in any way affect the open nature of a trial.*" (*Id.*, at 80–81; emphasis added.)

The rule in *Hovey* is a simple, benign, state-law rule of criminal procedure. It is not a constitutional rule, nor does it bear on petitioner's constitutional rights under the First Amendment. The question presented in this case—whether the voir dire process should be "sequestered" *from the public and the media*—is a question wholly separate from the sequestered voir dire ordered in *Hovey*. If, as petitioner contends, the denial of public access was based on the trial court's "application" of *Hovey*, that "application" is unsupported by anything in the *Hovey* opinion and is erroneous.

Conclusion

The exclusion of the public and the press from criminal trials may implicate fundamental constitutional rights of the defendant, the public and the press, and—in some cases—the jurors. Where these rights conflict, the courts will have to weigh them against each other. The resolution of the issue properly presented here—the constitutionality of the exclusion of the public from the voir dire in a capital case—entails such a balancing process. However, contrary to the claims of the parties, the rule of sequestered voir dire announced in *Hovey* has no implications for this issue, and does not impinge on the interests of the petitioner or the public.

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APPENDIX

SUMMARY OF THE HOLDINGS IN *HOVEY V. SUPERIOR COURT*, 28 Cal.3d 1 (1980)

In *Hovey* v. *Superior Court*, 28 Cal.3d 1 (1980), the California Supreme Court considered a capital defendant's pretrial challenge to the death-qualification of his jury. In its opinion resolving the challenge, the court did the following three things:

First, it denied, for failure of proof, Mr. Hovey's factual contention that death-qualification produces juries that are "conviction-prone" (see *Witherspoon* v. *Illinois*, 391 U.S. 510, 520, fn. 18 (1968)) and are incapable of functioning as impartial and effective decision-makers (see *Ballew* v. *Georgia*, 435 U.S. 223 (1978)). The failure of proof, however, concerned a single issue: the absence from the record of any evidence on the number and the characteristics of jurors who would be excluded from capital trials because they would automatically vote *for* the death penalty in every case—the "automatic death penalty jurors." (*Hovey* v. *Superior Court, supra*, at 63–69.) On every other issue, the California Supreme Court explicitly endorsed Mr. Hovey's factual showing. Specifically, the court found, on the basis of an extensive scientific record: (1) that there is a strong and well-established relationship between attitudes toward the death penalty and propensity to convict (*id.*, at 27–42); (2) that opponents of the death penalty who are excluded from jury service in capital cases pursuant to *Witherspoon* have attitudes that distinguish them from the remaining pool of jurors (*id.*, at 43–54); and (3) that women and blacks are disproportionately excluded by this process because of their opposition to the death penalty (*id.*, at 54–57).

Second, the California Supreme Court specifically

noted that there is a separate and independent basis for asserting the unconstitutionality of death-qualification: that it excludes a "cognizable class" from the jury pool, and therefore denies the defendant his right to trial by a jury drawn from a representative cross-section of the community as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. This argument had not been raised in the *Hovey* case, and the court intimated no opinion on its merits. (*Id.*, at 17–18, fn. 38; 20, fn. 45.)

Third, the court ordered, "pursuant to its supervisory authority over California criminal procedure, that in future capital cases that portion of the voir dire of each prospective juror which deals with issues which involve death-qualifying the jury should be done individually and in sequestration." (*Id.*, at 80; fns. omitted.)

The first two issues discussed in *Hovey* have also been litigated in other cases. In the Fifth Circuit, some of these claims were rejected as a matter of law: *Spinkellink* v. *Wainwright,* 578 F.2d 582 (5th Cir. 1978), cert. denied 440 U.S. 976; *Smith* v. *Balkcom,* 660 F.2d 573 (5th Cir., Unit B 1981), modified on rehearing, 671 F.2d 858 (5th Cir., Unit B 1982), cert. denied, ____ U.S. ____ [74 L.Ed.2d 148] (1982). The Eighth Circuit, on the other hand, has taken a contrary position, and in 1980 remanded a case to the District Court for an evidentiary hearing at which the defendant could attempt to prove the factual bases for his constitutional claims. (*Grigsby* v. *Mabry,* 637 F.2d 525 (8th Cir. 1980).) Amicus is informed that an extensive evidentiary hearing was subsequently held before The Honorable Garnett T. Eisele, chief judge of the federal District Court for the Eastern District of Arkansas, and that the matter has been under submission for several months. Ultimately, the resolution of these issues may rest with this Honorable Court.

The third issue discussed in *Hovey*—the rule of sequestered voir dire—is the one that is, supposedly, at issue in this case. It is not a constitutional rule, and it has not, to the knowledge of amicus, been litigated outside California.

APR 9 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PRESS-ENTERPRISE COMPANY,

Petitioner,

v.

THE SUPERIOR COURT OF CALIFORNIA,
RIVERSIDE COUNTY,

Respondent.

On Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District

BRIEF *AMICI CURIAE* OF THE SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS; ASSOCIATED PRESS MANAGING EDITORS ASSOCIATION; THE LOS ANGELES TIMES; THE MIAMI HERALD PUBLISHING CO.; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; THE NEW YORK TIMES COMPANY; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; THE SAN FRANCISCO CHRONICLE; AND THE WASHINGTON POST.

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INTEREST OF THE AMICI CURIAE

Amici curiae and their members are publishers, broadcasters, editors, reporters and photographers working throughout the United States. *See* Appendix *infra*. If the decision below is not reversed, the membership of these *amici* will be adversely affected in their ability to report the news to the public.

SUMMARY OF ARGUMENT

Twice since 1980, this Court has ruled that the press and public have a constitutional right of access to criminal trials. *See Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980); *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. 2613, 2618 (1982).[1] This right emanates both from our tradition of criminal trials open to the public and from the vital role of public trials in ensuring the integrity of the judicial process and our system of self-government. *Id.* at 2619-20.

The decision of the trial court in this case to close a crucial part of *voir dire* in a capital case and seal the transcript of the closed proceedings permanently violates the First Amendment right of access to criminal trials. From the dawning of our jury system, selection of the citizens who would determine a defendant's guilt or innocence has been part of the trial itself and open to public scrutiny. The evolution of the jury system has been an ongoing tribute to the principle that, as de Tocqueville observed, "[t]he institution of the jury . . . invests the people . . . with the direction of society."[2]

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[1] Although there was no opinion of the Court in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), seven justices recognized a right of access to criminal trials embodied in the First Amendment and applied to the States through the Fourteenth Amendment. *Id.* at 580-81 (Burger, C.J., announcing judgment); *id.* at 584-98 (Brennan, J., concurring in judgment); *id.* at 598-601 (Stewart, J., concurring in judgment); *id.* at 601-04 (Blackmun, J., concurring in judgment).

[2] A. de Tocqueville, Democracy in America 127-28 (New Am. Libr. ed. 1956).

The trial court's decision further ignores the imposing array of structural values that undergird the right of access to criminal trials. Closure removes a fundamental safeguard on trial proceedings designed to restrain the abuse of power, check corrupt practices, and protect the rights of the accused. In addition, closure deprives the public of information about its judicial system and hampers an informed discussion of public affairs. Because jurors are supposed to be representatives of an impartial public, the public must have full confidence in the means by which they are selected. The need for such confidence is greatest when the jury determines whether death is the proper punishment for the accused. To deny the press and public access to this portion of a criminal trial serves only to diminish the reservoir of public confidence enjoyed by the judiciary over the course of the last two centuries.

Accordingly, *amici* urge this Court to hold that an order closing *voir dire* in a criminal trial cannot survive constitutional scrutiny unless, following a hearing and findings articulated in the record, the trial court determines that (1) a compelling governmental interest mandates closure; (2) less restrictive alternatives to closure will be ineffective, and (3) closure will effectively prevent the perceived harm. In the instant case, the trial court failed to make the requisite showing and its order closing *voir dire* to the press and public cannot stand.

I. THE PRESS AND PUBLIC HAVE A FIRST AMENDMENT RIGHT OF ACCESS TO *VOIR DIRE*.

A. The First Amendment Grants The Press And Public A Right Of Access To Criminal Trials.

Chief Justice Burger stated in *Richmond Newspapers, Inc.* v. *Virginia* that "[w]ithout the freedom to attend . . . [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' " 448 U.S. at 580 (quoting *Branzburg* v. *Hayes*, 408 U.S. 665, 681 (1972)). This constitutional commitment to

public proceedings reflects the principle that "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern," *Landmark Communications, Inc.* v. *Virginia*, 435 U.S. 829, 839 (1978), and underscores " 'a profound judgment about the way in which law should be enforced and justice administered.' " *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 593 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)). Thus, the First Amendment right to attend trial proceedings springs from the "presumption of openness [that] inheres in the very nature of a criminal trial under our system of justice." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622.

The role of the press as surrogate for the public in the courtroom has grown along with the structure and size of our communities. Where once the entire population of a town could gather for a public trial, the press is now the citizenry's primary source of information about criminal proceedings. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 572-73; *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491-92 (1975).

In the instant case, the trial court's order closing *voir dire* in a capital case impinges directly on the First Amendment right of access to criminal trials. By summarily closing the courtroom, the trial court failed to recognize that the two principles that underlie previously enunciated constitutional law apply to *voir dire* with the same force as they apply to other critical moments of a trial such as the cross-examination of witnesses or the charging of the jury: (1) *voir dire* "historically has been open to the press and general public," and (2) access to *voir dire* "plays a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2619-20.[3]

---

[3] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 597-98 ("[R]esolution of First Amendment public access claims in individual cases must be strongly influenced by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances.") (Brennan, J., concurring in judgment).

B. *Voir Dire* And Jury Selection Are Integral Parts Of The Criminal Trial And Traditionally Have Been Conducted In Open Court.

This Court's decision in *Richmond* reflected the judgment of history. Marshalling contemporaneous accounts of English common law and American colonial practice, the Court concluded that "throughout its evolution, the trial has been open to all who care[d] to observe." 448 U.S. at 564 (Burger, C.J., announcing judgment). Historical materials, dating from the adoption of the First Amendment and earlier, made clear that public access "has long been recognized as an indispensable attribute of an Anglo-American trial." *Id.* at 569. The First Amendment right of access to judicial proceedings draws its essence from this common law heritage, not only because "the Constitution carries the gloss of history," but, more particularly, because the "tradition of accessibility implies the favorable judgment of experience." *Id.* at 589 (Brennan, J., concurring in judgment).[4]

Throughout Anglo-American history, the assembling, examination, and selection of jurors have been consistently conducted in public as an integral part of the trial of guilt or innocence. The roots of these traditions date to the early antecedents of the common law. Before the Norman Conquest, Anglo-Saxon trials were "open-air meetings of the freemen who were bound to attend them." F. Pollock, The Expansion of the Common Law 140 (1904). In pre-Norman times, criminal trial was by compurgation or by ordeal; the accused had to

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[4] *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. at 2623 ("*Richmond Newspapers* rests upon our long history of open criminal trials . . .") (O'Connor, J., concurring in judgment); *id.* at 2624 (emphasizing "historical tradition of open criminal trials") (Burger, C.J., dissenting); Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 601 ("It is gratifying to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial.") (Blackmun, J., concurring in judgment); Gannett Co. v. DePasquale, 443 U.S. 368, 389-91 (1979) (citing 19th-century English authority); *id.* at 418-27 (Blackmun, J., dissenting).

summon compurgators or "oath helpers" to swear their belief in his oath denying the charges against him. F. Maitland, The Constitutional History of England 116-19 (1908). These proceedings were conducted before the community at large, and have been described as "an ill-managed public meeting." F. Pollock, *supra*, at 30.

The Anglo-Saxon tradition of open proceedings continued after the C[illegible]uest, with the institution of trial by jurors called by the sheriff or the court, instead of compurgators or "oath helpers" called by the accused. Norman kings introduced in England the Frankish practice of summoning sworn bodies of neighbors to decide disputed questions of fact. 1 W. Holdsworth, A History of English Law 312 (3d ed. 1922); F. Maitland, *supra*, at 121-22. Early criminal juries, drawn from the neighborhood of the alleged offense, were as much witnesses as judges of the facts. Often the jurymen were already acquainted with the defendant and the facts; in broader terms, jurors were witnesses because they brought to the trial the sense of the community from which they were drawn. 1 W. Holdsworth, *supra*, at 317.

Thus, the defendant was tried "per pais" or "by the country," as represented by the jurymen. M. Hale, The History of the Common Law of England 336 (1713) (Runnington ed. 1820). Indeed, "it is in this effort to get the representative voice of the community that we find the key to the real origin of the petty jury." Wells, *The Origin of the Petty Jury*, 27 L. Q. Rev. 347, 355 (1911). The "town meeting" form of trial continued as the English common law gained character. By the time of Henry III (1216-72), juries themselves "became embarrassingly large and unwieldy." *Id.* at 356. Reports appear in the thirteenth century of trials involving "at least eighty-four jurors." *Id.* at 355 & n.5 (citing cases reported in Assize Rolls from Henry III's reign). As Chief Justice Burger's study of fourteenth-century materials demonstrated in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 566, attend-

ance of the community was encouraged and the entire proceeding was a decidedly public event.[5]

The transformation of the jury from a body of witnesses summoned to swear to already known facts to an impartial trier of facts is due in large part to the development of the law relating to challenges. 1 W. Holdsworth, *supra*, at 332, 336.[6] Eligibility requirements for jury service date from Norman times, and through the fourteenth and fifteenth centuries, rules flourished permitting objections to proposed jurors.[7]

Contemporaneous accounts of early jury selection procedures reveal that challenges and exceptions were routinely determined in open court, as the first phase of the trial on guilt or innocence.[8] In 1583, Sir Thomas Smith described the defini-

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[5] *See* E. Jenks, The Book of English Law 25 (6th ed. 1967) (" 'court day' has, from time immemorial, been one of the great rivals of the fair or pageant in the attracting of crowds"); 2 J. Bishop, New Criminal Procedure § 957 (2d ed. 1913) ("By immemorial usage, wherever the common law prevails, all trials are in open court, to which spectators are admitted.").

[6] The right to challenge jurors at the outset of the trial is probably as ancient as the institution of the jury itself. Bracton and Britton, writing in the thirteenth century, both mention it. *See* 1 W. Holdsworth, *supra*, at 324:

> As early as the days of Bracton it was recognized that upon an enquiry as to the guilt or innocence of the prisoner, the prisoner ought to be allowed to object to members of the jury on the ground that they were his personal enemies; and Britton allowed an accused person to object to the presence on the trial jury of persons who had presented him for trial. In 1302 an accused Knight objected to the jury . . . because . . ., not being Knights, they were not his peers.

[7] *Id.* at 324-25.

[8] In 1352, a statute was enacted to permit challenges to petty jurors on the ground of their participation as "indictors" on the presenting jury. 25 Edw. 3, C. 3, § 5; *see* T. Plunkett, A Concise History of Common Law 109 (1929). From earliest times, objections were allowed on grounds of personal hostility, or that a proposed juror was not a peer of the accused. 1 W. Holdsworth, *supra*, at 324-25. Sir

tive "proceedinges of causes criminall." T. Smith, De Republica Anglorum 85 (1583) (Alston ed. 1906). Smith places the sixteenth-century trial "[i]n the towne house, or in some open or common place." *Id.* at 96. As the trial begins, the judges and the accused are present, but the jurors have not yet been called. "At the end of [a] table [before the judges], there is a barre made with a space for thenquestes and xij men to come in when they are called. . . ." *Id.* The crier commands silence, and one of the judges "telleth the cause of their comming, and giveth a good lesson to the people" amassed in the "open or common place" of the proceedings. *Id.* at 96-97. The clerk then reads the indictment; if the accused pleads not guilty, he must be tried "by God and the Countrie," as represented by the jurymen. *Id.* at 98. One by one, the jurors are thereupon called forward to the "barre," and, at this stage, the defendant is allowed to challenge each juror, individually, as the juror is called:

> Then calleth he [the clerk] in the first Juror. B.C. come to the booke, and so giveth him an othe to go uprightlie betwixt the Prince and the prisoner, &c. If the prisoner objecteth nothing against him, he calleth an other, and so an other, till there be xii. or above. . . .

Id.

Occasionally, so many exceptions are taken, and so many prospective jurors rejected, that the entire "day is lost," *id.* at 79; objections for cause are many, and thirty-five peremptory challenges are allowed.[9] Smith, moreover, is clear that the entire trial proceeds

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John Fortescue, writing in the fifteenth century, stated that "[o]f these exceptions [to jurors] there are so many kinds and varieties that it is impossible to explain them in this short sketch." J. Fortescue, De Laudibus Legum Anglie 57-59 (1468-71) (Chrimes ed. 1942). Lord Coke in 1628 outlined numerous and detailed challenges. 1 E. Coke, Commentary Upon Littleton 155b-58b (1628) (Butler ed. 1853).

[9] *See* 1 E. Coke, *supra*, at 156b-58b.

> not after the fashion of the civill law but openly, that not only the xii, but the Judges, the parties and as many as be present may heare.

Id.

Voir dire of petty jurors also appears in accounts of seventeenth-century trials. In *Peter Cook's Trial*, 4 Har. St. Tr. 738 (O.B. 1696), for instance, the accused himself—*in open court*—attempted to pose questions directly to jurors in order to sustain challenges. The court ruled:

> You may aſk upon a Voyer Dire, whether he [the juror] have any Intereſt in the Cauſe; nor ſhall we deny you Liberty to aſk whether he be fitly qualified, according to Law by having a Freehold of ſufficent Value.

Id. at 748.[10]

This Court has previously recounted the adoption in the American colonies of the English tradition of open trials. *E.g.*, *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 567-69 (Burger, C.J., announcing judgment); *In re Oliver*, 333 U.S. 257, 271-72 (1948). *Voir dire* assumed broader significance in American trials than it had in England, yet there is no indication that the Americans revised the British practice of questioning and selecting jurors in open court.[11] In fact, American

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[10] *See* Francis Francia's Trial, 6 Har. St. Tr. 58-60 (O.B. 1716). Indeed, in *Harriſon's Trial*, 2 Har. St. Tr. 313 (O.B. 1660), the reporter remarks that the defendants' persistence in challenging jurors provoked laughter among the spectators in the courtroom: "Here the People ſeemed to laugh," he writes, upon the defendants' tenth peremptory challenge. *Id.* at 313.

[11] Under common law, as now, *voir dire* could be employed as a means for the defendant to obtain information in open court about jurors. Thus, in *Titus Oates' Trial*, 4 Har. St. Tr. 1 (K.B. 1685), the accused inquired of a prospective juror: "Are you not a Goldſmith in Fleetſtreet . . .?" To the juror's affirmative reply, the accused stated, "Very well, sir, I do not except against you, only I deſir'd to know whether it were you or not?" A peremptory challenge could have been exercised.

courts soon enlarged the function of *voir dire*. In 1807, Chief Justice Marshall, sitting as a trial judge in Aaron Burr's trial for treason, ruled that jurors could be asked on *voir dire* whether they had formed an opinion on Burr's guilt. *United States* v. *Burr*, 25 F. Cas. 49 (C.C.D.Va. 1807) (No. 14,692g). This holding was a clear rejection of the English rule prohibiting examination of a juror about any preconceived opinion as to guilt, or the juror's "dishonor or credit."[12] In the *Burr* trial, *voir dire* was undertaken in open court, in accordance with the English tradition. *Id.* at 76-87.

Chief Justice Marshall's ruling in the *Burr* trial was highly influential, and nearly all states soon permitted examination of jurors themselves in an effort to bring forth prejudice or bias, even if the questions concerned a juror's preconceived opinion, "dishonor or credit."[13] Expanded *voir dire* of jurors became a uniquely American characteristic of trial proceedings.[14]

Although the permissible scope of *voir dire* in American criminal trials has been expanded, jurors are protected because *voir dire* questioning has largely been entrusted to the sound discretion of trial judges. Trial courts, of course, have power to prevent abusive questioning and to restrain counsel

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[12] *Voir dire* of jurors was more limited under English common law than it is in the United States today. 3 W. Blackstone, Commentaries on the Laws of England 364 (10th ed. 1787). Indeed, at common law, a juror could not be asked whether he had already stated an opinion as to the defendant's guilt or innocence, since answering could require the juror to commit the slander of stating *in public*, prior to conviction, that the defendant had committed crime. Peter Cook's Trial, 4 Har. St. Tr. at 750. The very existence of restraints on asking jurors themselves questions "touch[ing] dishonor or credit," 1 E. Coke, *supra*, at 158b, bespeaks the measure of public exposure which *voir dire* has always entailed.

[13] J. Van Dyke, Jury Selection Procedures 143 (1977).

[14] To this day in England and Canada, jurors may not be questioned about personal bias. *Id.*

from harassing or embarrassing jurors. Indeed, in the federal courts, as in thirteen states, the trial judge has nearly unfettered control of the questioning of prospective jurors: attorneys may submit proposed questions to the judge, which the judge, in his discretion, may or may not pose to potential jurors; and the judge need not allow attorneys directly to examine the veniremen at all. J. Van Dyke, Jury Selection Procedures 282-84 (1977).[15]

American courts consistently have regarded *voir dire* and selection of jurors as the crucial first phase of the trial at which guilt or innocence is determined, a proceeding historically open to the public. In his authoritative opinion for the Ninth Circuit in *United States* v. *Brooklier*, 685 F.2d 1162, 1167 (9th Cir. 1982), Chief Judge Browning surveyed the American authorities and concluded that "[t]he *voir dire* is generally considered 'part of the trial.' "[16]

From this tradition—unbroken throughout centuries of Anglo-Saxon and American practice—it is clear that jury selection has always been deemed part of the actual trial and, as such, has been conducted in public. Accordingly, this Court should declare that the "presumption of openness [which] inheres in the very nature of a criminal trial under our system of justice," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 573 (Burger, C.J., announcing judgment), attaches to *voir dire* examination of jurors as well.

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[15] *Amici* have located no rule of court or statute, in any state, permitting closure of the courtroom during *voir dire*. To be sure, judges occasionally permit jurors to answer particular *voir dire* questions outside the hearing of other jurors—at side bar, for instance. *See, e.g.*, United States v. Ridley, 412 F.2d 1126 (D.C. Cir. 1969); Hovey v. Superior Court, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980); North Carolina v. Thomas, 294 N.C. 105, 240 S.E.2d 426 (1978); Wientjes v. Kentucky, 263 S.W 2d 721 (Ky. 1953).

[16] *Accord*, Commercial Printing Co. v. Lee, 262 Ark. 87, 89-90, 553 S.W.2d 270, 271 (1977) (*voir dire* "part of the trial itself"); *In re* United States *ex rel.* Pulitzer Publishing Co., 635 F.2d 676 (8th Cir. 1980); Great Falls v. District Ct., 608 P.2d 116 (Mont. 1980).

C. Access To *Voir Dire* By The Press And Public Enhances The Integrity Of The Judicial Process And Our System Of Self-Government.

The value of the open criminal trial, including *voir dire*, to the judicial process and to our system of self-government "is recognized in both logic and experience." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620. Public scrutiny of the process through which a jury is selected, either through actual attendance in the courtroom or through press reports of the proceedings, enhances the effective functioning of the judicial system and public confidence in its operation. Even a cursory review of the coverage of criminal trials by the American press reveals that news reports about *voir dire* facilitate the informed debate that fosters "our republican system of self-government."[17]

1. Open *voir dire* provides a fundamental safeguard on the fair conduct of judicial proceedings.

"[P]ublic access to the criminal trial fosters an appearance of fairness . . . and serve[s] as a check upon the judicial process." *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620.[18] A

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[17] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. at 587-88 (Brennan, J., concurring in judgment):

> [t]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a *structural* role to play in securing and fostering our republican system of self-government. . . . Implicit in this structural role is not only the principle that debate on public issues should be uninhibited, robust and wide-open . . . but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication. [footnote omitted].

[18] *See* United States v. Brooklier, 685 F.2d 1162, 1167 (9th Cir. 1982):

> There can be no doubt of the importance of public scrutiny of the jury selection process to the effective functioning of the government as well as the judicial system itself. The meticulous care

nation founded on the principle of ordered liberty must have a system of justice "that demonstrates the fairness of the law to [its] citizens," *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 594 (Brennan, J., concurring in judgment), because those citizens have "a definite and concrete interest in seeing that justice is swiftly and fairly administered," *Gannett Co.* v. *DePasquale*, 443 U.S. 368, 383 (1979). The need to demonstrate the fairness of judicial proceedings applies with equal force to the examination of prospective jurors as to the examination of witnesses later in the trial.[19]

The accused in a criminal case enjoys the right to a jury trial, *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), a "fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd*, 366 U.S. 717, 722 (1961). Conducting criminal trials in public furthers "the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 593 (Brennan, J., concurring in judgment); *see Estes* v.

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devoted to securing a fair and impartial jury exemplifies the search for even-handed justice characteristic of our system of criminal justice. Public access to the process will heighten public respect for that system. At the same time public scrutiny will encourage those who participate in the jury selection process to enhance the quality of the process and safeguard its integrity.

[19] *See* Ryan & Neeson, *Voir Dire: A Trial Technique in Transition*, 4 Am. J. Tr. Advoc. 523, 526 (1981) ("[i]t is common knowledge that the process of jury selection is a critical component in the successful presentation of a case"); Fahringer, *In the Valley of the Blind: A Primer on Jury Selection in a Criminal Case*, 43 Law & Contemp. Probs. 116, 116 (1980) ("[j]ury selection is the most important part of any criminal trial"); Van Dyke, *Voir Dire: How Should It Be Conducted To Ensure That Our Juries Are Representative and Impartial?*, 3 Hastings Const. L.Q. 65 (1976) (many trial lawyers argue that cases are won or lost in *voir dire*); Note, *Restricting Inquiry Into Racial Attitudes*, 19 Am. Crim. L. Rev. 719, 721 (1982) ("[t]rial by an impartial jury is among the most fundamental rights guaranteed a criminal defendant").

Texas, 381 U.S. 532, 538-39 (1965). Public questioning of potential jurors during *voir dire* encourages frank responses from veniremen and ensures swift exposure of abuse of defendants' rights.[20]

In this regard, public access to *voir dire* safeguards the integrity of the jury selection process and the criminal trial itself. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620; *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 596-97 (Brennan, J., concurring in judgment). Public *voir dire*, reported to the community by the press, makes it possible for those with information to come forward and rebut false information provided by prospective jurors. *See id.* at 569-70 (Burger, C.J., announcing judgment); *id.* at 596-97 (Brennan, J., concurring in judgment). Such publicity can "induce un-

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[20] *See* J. Van Dyke, *supra* note 13, at 154-55 (challenges have been employed to exclude members of race or class from jury); Mullin, *The Jury System in Death Penalty Cases: A Symbolic Gesture*, 43 Law & Contemp. Probs. 137, 146 (1980) ("[d]ue to the highly prejudicial atmosphere in execution cases, probative and sifting *voir dire* is a basic requirement [in insuring] fair and impartial jurors will be selected"); Comment, *Racial Bias and the Right to an Impartial Jury: A Standard for Allowing Voir Dire Inquiry*, 33 Hastings L.J. 959, 961 (1982).

This Court has recognized that the composition of the jury in a capital case is crucial to the fairness of the trial and, therefore, to the constitutional validity of the death sentence itself. *See* Enmund v. Florida, 102 S. Ct. 3368, 3375-76 (1982); *id.* at 3386 (O'Connor, J., dissenting); Coker v. Georgia, 433 U.S. 584, 596 (1977) (White, J., announcing judgment); Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., announcing judgment); Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (Stewart, J., announcing judgment); Furman v. Georgia, 408 U.S. 238, 299-300 (1972) (Brennan, J., concurring); *id.* at 386 n.11 (Burger, C.J., dissenting); *id.* at 439-40 (Powell, J., dissenting).

known witnesses to come forward with relevant testimony." *Gannett Co.* v. *DePasquale*, 443 U.S. at 383.[21]

Contemporary news reports are illustrative of the role of press and public access to *voir dire* in ensuring the fairness and integrity of the criminal trial. In 1972, for example, a reporter for the *St. Louis Post-Dispatch* observed the *voir dire* of thirty-one criminal trials involving black defendants and found that, of the seventy-seven blacks qualified to serve and not challenged for cause, seventy-four percent were challenged peremptorily by the prosecution.[22] As a result, the *Post-Dispatch* found that, while blacks on the venire reflected their proportionate number in the county's population, prosecutors had systematically excluded black jurors from cases involving

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[21] Public knowledge of the responses of prospective jurors can lead to the discovery of false or incomplete information elicited during *voir dire*. *See e.g.*, *Antonelli, Yeldell Ask Retrial; Father of Juror Fired by Parking Lot Firm*, Wash. Post, Nov. 15, 1978, at C 1, col. 5 (reporting mistrial after completion of case based on juror's failure to state during *voir dire* that her father had once been fired by defendant's firm); *Study Raises Questions About Mitchell-Stans Juror*, Wash. Post, Feb. 5, 1976 (report on juror's friendship, never disclosed during *voir dire*, with member of prosecution staff).

[22] St. Louis Post-Dispatch, Dec. 24, 1972, at 1, col. 4; *see Blacks Cry Foul Over Jury Lists*, Philadelphia Bull., July 14, 1980, at 13, col. 5 ("Anthony Pannel, Ronald Jones and other black defendants know what it's like to face a nearly white or all-white jury in Delaware County Court" because of jurisdiction's jury selection process); *Defense Attorney Challenges Hillsborough Jury Selection*, Tampa Tribune, Apr. 4, 1980, at 1A, col. 5 (*voir dire* has resulted in system where white collar, middle income defendant is denied fair trial); *Trial By Peers? Few Young Adults, Blacks, Women Serve on Juries, Psychologist Says*, Greensboro Daily News, July 15, 1979, at B 1, col. 1 ("A Raleigh psychologist who specializes in jury selection . . . contends there is a conscious effort to exclude not only young people from jury lists but also blacks and women"); *Juries Are Short on Blacks*, Akron (Ohio) Beacon J., Dec. 26, 1976, at A 1, col. 4 (absence of blacks on juries in Summit County, Ohio.).

black defendants.[23] Moreover, the newspaper observed that local prosecutors altered their systematic striking of blacks when they learned its reporter's purpose in the courtroom.[24] Thus, public scrutiny of *voir dire* can enhance the quality of the process through which the arbiters of guilt or innocence are chosen.[25]

2. Open *voir dire*, especially in capital cases, facilitates the free discussion of public affairs.

Underlying the constitutional right of access to criminal trials is the First Amendment's purpose of facilitating the free discussion of governmental affairs. *Globe Newspaper Co.* v.

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[23] *Cf.* Mullin, *supra* note 20, at 148 (capital defendants are often faced with jury that does not represent cross-section of community and is composed only of jurors who believe in death penalty due to *voir dire* practices of prosecutors); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662, 673-81 (1974) (systematic exclusion by prosecutors of blacks from juries hearing cases of black defendants, as detailed in newspaper articles, denies defendants their constitutional right to trial by jury representing fair cross-section of community); Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 Mich. L. Rev. 1, 5 (1982) (systematic exclusion by prosecutors of jurors opposed to death penalty violates defendant's due process rights).

[24] St. Louis Post-Dispatch, May 13, 1973, at 6A, col. 1; Comment, *supra* note 23, at 676.

[25] In 1981, the *Baltimore Sun* reported the evolution of jurors' views on imposing the death penalty over the course of a trial. The *Sun* reported the jurors' responses during *voir dire*, described how the evidence affected them and explained how they ultimately reached their decision. According to the *Sun*, the defendant's acquittal was due in large part to the fairness of the process. *Horton Jurors Now Say Trial Changed Them*, Baltimore Sun, Jan. 6, 1981, at C 1, col. 5; *see Jurors' Views on Morality Key to Shooting Trial in Loudon*, Wash. Post, Dec. 17, 1980, at B 1, col. 1 (detailing questions asked to ensure fairness of jurors).

Superior Court, 102 S. Ct. at 2619; *Mills* v. *Alabama*, 384 U.S. at 218 (1966).[26] Public access to *voir dire* has allowed the press to provide firsthand accounts of the process through which representatives of the community are selected for service,[27] the strategies of counsel in posing questions during *voir dire*,[28] interviews with veniremen after they have been questioned,[29] and the impressions of staff members called for jury duty.[30] Only by access to *voir dire* can the press perform this vital function.

As lawyers, social scientists and psychologists promote the notion that expensive survey techniques can be employed to select juries likely to reach preordained verdicts, public scrutiny of the jury selection process has become increasingly significant.[31] Indeed, advanced jury selection techniques are

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[26] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 587 (1976); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 839 (1978).

[27] *See, e.g., We the Jury Find the . . .*, Time, Sept. 28, 1981, at 44-56; *A Jury of Whose Peers?*, Christian Sci. Monitor, Aug. 22, 1977, at 18, col. 1.

[28] *See, e.g., How do trial lawyers pick those 12 peers?*, Akron (Ohio) Beacon J., Feb. 22, 1976, G 1, col. 1; *The Court's Hunt for the Perfect Jury; Each Lawyer Seeking a Slight Edge at Trial*, Chicago Tribune, Feb. 13, 1980, at 1, col. 1; *Hung Up on Jury Selection; In Court, Plumbing the Mysteries of the Human Face*, Wash. Post, Aug. 4, 1978, at C 1, col. 5; *He Likes a Bleached Blonde on the Jury for That Kind of Case*, Wash. Star, June 3, 1975, at B 1, col. 1.

[29] *See, e.g.*, Raleigh (N.C.) News & Observer, Mar. 9, 1980, § 4 at 1, col. 1.

[30] *See, e.g., The Trials and Rewards of Jury Duty . . . And Ways to Improve It*, Des Moines Tribune, Nov. 16, 1977.

[31] *See* J. Van Dyke, *supra* note 13, at 188 (expensive jury selection techniques "may indeed help obtain a jury that acquits a defendant, but possibly at the cost of diminishing respect for the judicial system. Panels that seem to have been manipulated by one side or the other (or both) will not fulfill their purpose of carrying legitimacy to the community."); Ryan & Neeson, *supra* note 19, at 532-34 (key to

now employed in all manner of cases, from complex antitrust litigation to capital cases such as the one at issue here.[22] Access to *voir dire* is crucial to an informed public debate about this revolutionary theory of judicial administration.

Indeed, no facet of the judicial process is subject to more intense national debate than the decision to impose the penalty of death. Our government performs no more solemn function than taking the life of a human being as punishment for his crimes. It has been argued that the selection of jurors in a death penalty case is the one factor most determinative of the

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selecting jury is gathering empirical information through community-wide investigation and survey to find which persons will most likely decide in desired way); Fahringer, *supra* note 19, at 121 (value in gathering information about jurors through "the science of survey research" is that while jurors may not give candid answers, "they cannot conceal their pedigree and background"); N.Y. Times, Nov. 28, 1982, Magazine, at 71 ("a controversial new use of psychosocial research views jurors not as free moral agents, but as organisms whose mental and emotional processes are essentially predictable"); L.A. Times, Sept. 27, 1974, § 1A, at 2, col. 1 (describing perils of new techniques used to select juries); Wall St. J., Aug. 12, 1974, at 1, col. 1 (social scientists' role in selecting juries may produce biased panels); Etzioni, *Science: Threatening the Jury Trial*, Wash. Post, May 26, 1974, at C 3, col. 1 ("the jury's impartiality is threatened because defendants' attorneys have discovered that by using social science techniques, they can manipulate the composition of juries to significantly increase the likelihood that their clients will be acquitted").

[22] *See* Nietzel & Dillehay, *The Effects of Variations in Voir Dire Procedures in Capital Murder Trials*, 6 L. & Hum. Behav. 1 (1982) ("scientific jury selection has now trickled down to defendants involved in less celebrated cases or what one practitioner has termed the 'typical criminal case' "); National Jury Project, Jurywork: Systematic Techniques (1979).

Social science techniques of jury selection were first popularized in a series of highly publicized trials, including those of Joan Little, the Harrisburg Seven, Angela Davis, John Mitchell and Maurice Stans. *See* N.Y. Times, Nov. 28, 1982, Magazine, at 71; Wall St.J., Aug 12, 1974, at 1, col. 1.

sentence ultimately imposed.[33] Prohibiting access to *voir dire* in a capital case, thereby foreclosing public scrutiny of the criteria used to select the persons who must determine the defendant's fate, "limit[s] the stock of information from which members of the public may draw." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 576 (Burger, C.J., announcing judgment) (quoting *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 783 (1978)). Such withholding of information about perhaps the most crucial portion of a capital case restricts the public's ability to determine whether the system as a whole, or the trial at issue, is fair and just.

In this regard, open *voir dire* in capital cases has enabled the press to inform the public about *voir dire* and jury selection in trials of public significance. The *San Francisco Chronicle*, for example, provided extensive coverage of *voir dire* in the so-called "Zebra" murder trial[34] and the trial of a prominent public official for the killings of Mayor George Moscone and Supervisor Harvey Milk.[35] The *Chronicle* explained the methods by which jurors were selected, the questions posed in *voir dire*, and the prospective jurors' views on capital punishment.[36]

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[33] *See* J. Van Dyke, *supra* note 13, at 139; Winick, *supra* note 23, at 79; Nietzel & Dillehay, *supra* note 32, at 10-11. For example, coverage of the jury selection process in the trial of four police officers charged with killing a black man led the *Miami Herald* to report, in the wake of rioting following an acquittal by an all-white, all-male jury, that a "defense attorney said the prosecution made its biggest mistake in jury selection." *Hindsight: Advice, Criticism Plentiful*, Miami Herald, May 20, 1980, at 18 A, col. 1.

[34] *See* S.F. Chron., Mar. 12-Apr. 3, 1975.

[35] *See* S.F. Chron., Apr. 25-28, 1979.

[36] *See generally This Jury Was Tough to Gather*, Tallahassee (Fla.) Democrat, Jan. 20, 1980, at 1 B, col. 6 (describing juror qualification in longest criminal jury selection process in Florida history); *11 Jurors Impaneled in Epperly Murder Trial*, Roanoke (Va.) Times & World-News, Dec. 9, 1980, at A 1, col. 3 (reporting questions, answers and qualifications used to select jury).

Perhaps the most significant function served by open criminal trials, including *voir dire*, is the creation of public confidence in the criminal justice system. Closed criminal trials "breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 595 (Brennan, J., concurring in judgment).[37] Confidence in the judicial process can be endangered if the public is denied access to that portion of the trial during which the qualifications of the triers of fact are established.[38]

This Court need look no further than the recent trial of John W. Hinckley, Jr. for an unfortunate example of how closed *voir dire* can contribute to diminished public confidence in the administration of justice.[39] The jury's verdict, finding the defendant not guilty by reason of insanity, produced considerable public controversy, which was heightened when transcripts of *voir dire*, released to the press and public after the trial, revealed that several jurors had close relatives once confined to mental hospitals.[40] Irrespective of whether this fact had any *actual* effect on the integrity of the trial, the resulting *percep-*

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[37] *Accord*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 587; Cox Broadcasting Corp. v. Cohn, 420 U.S. at 495; *In re* Winship, 397 U.S. 358, 364 (1970).

[38] *See* J. Van Dyke, *supra* note 13, at xii-xiv ("If the jury's decision is not accepted as impartial, respect for the whole system breaks down . . . . The jury's power rests in the capacity of individuals with diverse viewpoints to reach a common decision that can be accepted as the community's verdict and will carry weight with a diverse community."); Mullin, *supra* note 20, at 144 (impartial jury is key to unbiased decision in emotional case).

[39] *See, e.g.*, N.Y. Times, Apr. 28, 1982, at A1, col. 1; *id.* at A22, col. 1; *id.* Apr. 29, 1982, at A 28, col. 1; *id.* Apr. 30, 1982, at A 23, col. 3; *id.* May 1, 1982, at 11, col. 4.

[40] *See* Wash. Post, June 4, 1982, at C 1, col. 2 (transcripts of *voir dire*, released after sentencing, reveal information not previously published).

tion of injustice may have been avoided had full public scrutiny of *voir dire* been guaranteed at the outset.

The Hinckley trial demonstrates that closure of *voir dire* in a criminal case to the press and public reduces the traditionally "therapeutic value" of such trials. As Chief Justice Burger wrote in *Richmond*:

> The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner or in any covert manner . . . . A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.

448 U.S. at 571 (Burger, C. J., announcing judgment).

II. *VOIR DIRE* CANNOT BE CLOSED TO THE PRESS AND PUBLIC WITHOUT FINDINGS, ARTICULATED IN THE RECORD, THAT:

A. ABSENT CLOSURE, THERE IS A SUBSTANTIAL PROBABILITY OF IRREPARABLE HARM TO A COMPELLING INTEREST;

B. NO LESS RESTRICTIVE ALTERNATIVES TO CLOSURE ARE AVAILABLE; AND

C. CLOSURE WILL EFFECTIVELY PROTECT AGAINST THE PERCEIVED HARM.

In *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620, this Court held that trial proceedings cannot be closed to the press and public unless closure "is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." Because closure jeopardizes First Amendment rights, the Ninth Circuit applied the teachings of *Globe* to closure of *voir dire* in *United States* v. *Brooklier*, 685 F.2d 1162 (9th Cir. 1982). Under the test articulated in *Brooklier*, before ordering closure of any portion of a criminal trial, including *voir dire*, a court must make findings, articulated in the record, that (A) there is a substantial probability that a

compelling interest will suffer irreparable harm absent closure; (B) no adequate alternatives to closure are available; and (C) closure will effectively protect against the perceived harm. *Id.* at 1167; *see Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620. In the instant case, the trial court failed to articulate any compelling interest that necessitated closure, failed to consider less restrictive alternatives, and failed to recognize that closure was wholly ineffective in protecting those interests it purported to find.

A. The Trial Court Made No Finding That, Absent Closure, There Was A Substantial Probability Of Irreparable Harm To A Compelling Interest.

Before ordering that any portion of a criminal trial, including *voir dire*, be closed to the press and public, the trial judge must determine that there is a substantial probability that open proceedings will result in irreparable harm to a compelling interest. *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2620; *United States* v. *Brooklier*, 685 F.2d at 1167. Such a determination must be premised on specific findings, articulated in the record. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 581 (Burger, C. J., announcing judgment); *Gannett Co.* v. *DePasquale*, 443 U.S. at 446 (Blackmun, J., dissenting); *United States* v. *Brooklier*, 685 F.2d at 1168.

In this case, the trial court failed to identify any interest so compelling as to overcome the First Amendment rights at stake. When the court orally ordered that the courtroom be closed to the press and public on October 19, 1981, it premised the need for closure solely on the California Supreme Court's decision in *Hovey* v. *Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). In *Hovey*, the California Supreme Court sought to ensure an impartial jury in capital cases by minimizing the effect of the *voir dire* process on the attitudes of potential jurors. 28 Cal. 3d at 79-80, 616 P.2d at 1353-54, 168 Cal. Rptr. at 180-81. To this end, the court held that a defendant in a capital case was entitled "to have that portion of the *voir dire* of each prospective juror, which deals

with issues other than those traditionally inquired into at any criminal trial, conducted outside the presence of the other prospective jurors." 28 Cal. 3d at 82, 616 P.2d at 1355, 168 Cal. Rptr. at 182.[41]

Hovey, however, explicitly holds that *no* compelling interest in preserving the impartiality of the jury is served by closing *voir dire* to the press and public. Chief Justice Bird, writing for the state supreme court, stated:

> This rule will not in any way affect the open nature of a trial. Although trial counsel or the court may pose general questions to the panel, the venirepersons should not respond to any questions beyond those routinely asked in any criminal trial until they are outside the presence of their fellow venirepersons.

28 Cal. 3d at 80-81, 616 P.2d at 1354, 168 Cal. Rptr. at 181. *Hovey* does not hold that the press and public should be excluded from *voir dire*, only that the statements of any potential juror during a portion of *voir dire* in capital cases be made out of the presence of other potential jurors. Indeed, closure of *voir dire* to the press and public holds little or no relationship to the interest articulated in *Hovey*—the prejudicial effect that jurors may have upon *each other*. *Hovey*, therefore, does not provide a compelling interest to support closure.

Nor can the after-the-fact concern for juror "privacy" articulated by the trial court in its February 23, 1982 order constitute a compelling interest. *United States* v. *Brooklier*, 685 F.2d at 1172-73. The trial court asserted that "some of the jurors had some special experiences in sensitive areas that do not appear

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[41] In *Hovey*, the California Supreme Court explained that there is *no* state interest in questioning jurors individually on topics unrelated to imposition of the death penalty. The court asserted that individual questioning was not called for with respect to such subjects as the race of the trial participants, use of drugs or alcohol, or the effects of sexual activity. Hovey v. Superior Court, 28 Cal. 3d at 81 n.137, 616 P.2d at 1354 n.137, 168 Cal. Rptr. at 181-82 n.137.

to be appropriate for public discussion." Such concerns may well exist, but they can hardly rise to the level of justifying secret proceedings or records. This Court has held that the "public discussion" of information revealed in judicial proceedings, even if "sensitive" or "embarrassing," is protected by the First Amendment and outweighs any competing interest in "privacy." *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 491-96. Indeed, the First Amendment grants the press the right to exercise "editorial control and judgment" and determine whether to disseminate such information to the citizenry. *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 258 (1974); *see Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 124 (1973).

Moreover, neither rationale asserted by the trial court is supported by specific findings, set forth in the record, that open proceedings posed a substantial probability of irreparable harm. Conclusory statements arbitrarily declaring that closure is necessary are not sufficient. "Since the purpose of the findings is to enable the appellate court to determine whether the closure order was properly entered, the findings must be sufficiently specific to show that the three substantive prerequisites to closure have been satisfied." *United States* v. *Brooklier*, 685 F.2d at 1168-69. Indeed, the court's failure to articulate any findings in support of closure, coupled with its reliance on *Hovey* as requiring closure, indicates the trial court's view that at least a portion of *voir dire* must be closed to the public whenever the death penalty may be imposed. Such a mandatory ban on public access is clearly impermissible because "the circumstances of the particular case may affect the significance of the interest" involved. *Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2621.

B . The Trial Court Failed To Consider Less Restrictive Alternatives.

In order to close any portion of a criminal trial, including *voir dire*, a trial court must consider and reject alternatives to closure that are less restrictive of the exercise of First Amend-

ment rights. *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 581-82 (Burger, C. J., announcing judgment); *Nebraska Press Association* v. *Stuart*, 427 U.S. at 563-65; *United States* v. *Brooklier*, 685 F.2d at 1169. There is nothing in the record in the instant case to indicate that the trial court considered *any* alternative other than closure of *voir dire*.[42] Yet less restrictive alternatives were available.[43] *Hovey* itself makes clear that any threat to the impartiality of the jury can be avoided simply by questioning potential jurors one at a time in open court, out of the presence of the remaining veniremen. Thus, if the trial court did, in fact, base its closure order on *Hovey*, the least restrictive method of vindicating the interest in jury impartiality articulated in that case is to exclude potential jurors from portions of *voir dire*, *not* to close the courtroom to the press and public. Similarly, the trial court failed to explore less restrictive alternatives that would protect its after-the-fact concern for juror privacy. For example, the court could well have screened counsels' questions in advance,

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[42] The trial court's refusal to release the transcript of *voir dire*, even after conclusion of the trial and sentencing of the defendant, is further evidence that the court simply ignored its constitutional duty to consider less restrictive alternatives. *See* Globe Newspaper Co. v. Superior Court, 102 S. Ct. at 2620-23; United States v. Brooklier, 685 F.2d at 1172. This Court has held that even when a proceeding is properly closed, the transcript must be released as soon as the danger of prejudice has passed. Gannett Co. v. DePasquale, 443 U.S. at 393. Indeed, the trial court's failure to release the transcript is a continuing controversy that ensures that the instant case is not moot. In the last analysis, however, "the availability of a trial transcript is no substitute for a public presence at the trial itself." *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. at 597 n.22 (Brennan, J., concurring in judgment).

[43] *See, e.g.*, Nebraska Press Ass'n v. Stuart, 427 U.S. at 562-65; Sheppard v. Maxwell, 384 U.S. at 358-62; *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press—Fair Trial" Issue*, 87 F.R.D. 519, 530-35 (1980); Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 Harv. L. Rev. 1899, 1916 (1978).

thereby preventing irrelevant "personal" inquiries from being put to potential jurors in the first place.[44] Even in those circumstances in which such inquiries may be necessary, courts have identified a number of less restrictive alternatives to closure that adequately protect the asserted privacy interests. *See, e.g., United States* v. *Layton*, 519 F. Supp. 959 (N.D. Cal. 1981).

C. The Trial Court's Order Closing The Courtroom Did Not Protect Against The Perceived Harm.

Before closing any portion of a criminal trial, including *voir dire*, the trial court must demonstrate that closure will effectively protect the compelling interest at stake. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622; *United States* v. *Brooklier*, 685 F.2d at 1169. In this case, there has been no showing that closure will effectively protect the interests identified by the trial court. Even when the courtroom is closed, trial participants and court personnel may still describe the *voir dire* process to the press and public. *See Globe Newspaper Co.* v. *Superior Court*, 102 S. Ct. at 2622. Such second-hand information may be either inadvertently or deliberately distorted. This Court has recognized that "given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts." *Nebraska Press Association* v. *Stuart*, 427 U.S. at 567.

The absence of any showing that closure will effectively serve its intended purpose is particularly acute with respect to the perceived interest in juror privacy. In this case, a portion of *voir dire* unrelated to the death penalty was conducted in public under the trial court's construction of *Hovey*. Presumably, questions concerning the political, religious and even sex-

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[44] *See* United States v. Barnes, 604 F.2d 121 (2d Cir.), *cert. denied*, 446 U.S. 907 (1979); Comment, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 Calif. L. Rev. 708 (1982); Comment, *Voir Dire Limitations as a Means of Protecting Jurors' Safety and Privacy*, 93 Harv. L. Rev. 782 (1980).

ual preferences of jurors, if permitted in the first instance by the trial court, would have been posed in this public proceeding.[45] *Voir dire* relating to imposition of the death penalty, according to the California Supreme Court, does not include inquiries calling for the disclosure of "private" information. *See Hovey* v. *Superior Court*, 28 Cal. 3d at 81 n.137, 616 P.2d 1354 n.137, 168 Cal. Rptr. at 181-82 n.137. Thus, it is difficult to perceive how juror privacy was enhanced by holding the "death-qualifying" portion of *voir dire* in secret.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the decision below be reversed.

Respectfully submitted,

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[45] *See* note 41 *supra*.

APPENDIX

The Society of Professional Journalists, Sigma Delta Chi, is a voluntary, non-profit organization of 28,000 members representing every branch and rank of print and broadcast journalism. Formed in 1909, it is the largest organization of journalists in the United States. Among the Society's purposes are its commitments to ensure that the public's business is conducted in public and to keep governmental proceedings, including court hearings, open to public inspection. Members of the Society regularly prepare news reports about the administration of justice, including reports about the jury selection process.

The American Newspaper Publishers Association is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of about 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation, in the United States.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 850 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over 50 years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and "the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people."

The Associated Press is a membership non-profit corporation organized under the laws of the State of New York. It is a news wire service with the primary purpose of gathering, editing, and transmitting news reports and photographs to its 1,350 member newspapers and its 3,300 member broadcast stations throughout the United States, and to other publishers throughout the world.

The Associated Press Managing Editors Association is a membership non-profit corporation organized under the laws of the State of New York. Its members are the managing editors and other chief news executives of approximately 500 newspaper members of The Associated Press and The Canadian Press. Its principal purpose is the improvement of news writing and reporting and the content of the nation's daily newspapers and AP's news services.

The Los Angeles Times, a division of the Times Mirror Company, is a daily newspaper published in Los Angeles, California, with a daily circulation of 1,081,050 and a Sunday circulation of 1,340,743.

The Miami Herald Publishing Co., a division of Knight-Ridder Newspapers, Inc., publishes *The Miami Herald*, which has a daily circulation of 422,275.

The National Association of Broadcasters is a trade association consisting of over 5,200 radio and television stations and all the nationwide commercial broadcast networks. Among its primary concerns is maintaining the vitality of the First Amendment guarantee of freedom of the press.

The National Newspaper Association is a trade association consisting of more than 5,500 weekly and daily newspapers located throughout the United States. Since 1885, a major purpose of the Association has been to preserve the constitutional guarantee of freedom of the press.

The New York Times Company publishes *The New York Times*, which has a circulation of 929,000 on weekdays and 1,523,000 on Sundays, as well as thirty other newspapers. It owns three television stations, two radio stations and cable TV systems.

The Radio-Television News Directors Association ("RTNDA") is a non-profit professional organization of journalists. RTNDA includes approximately 2,000 members who are active at the network and local levels in the supervision, reporting and editing of news and public affairs programming on radio and television, both broadcast and cable.

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and news editors from the print and broadcast media devoted to the protection of the First Amendment interests of the press. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The *San Francisco Chronicle*, a division of the Chronicle Publishing Co., is a daily newspaper published in San Francisco, California, with a daily circulation of 540,000 and a Sunday circulation of 705,625. The Chronicle Broadcasting Co., a wholly owned subsidiary of Chronicle Publishing Co., operates three television stations.

The Washington Post, a division of the Washington Post Co., publishes a daily newspaper of general circulation in the Washington, D.C. area (circulation approximately 750,000 weekdays, 950,000 Sundays), and maintains a substantial newsgathering organization.

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Reply Attention J.D. Ward

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Re: PRESS ENTERPRISE COMPANY v. THE
SUPERIOR COURT OF CALIFORNIA
RIVERSIDE COUNTY
Case No. 82-556

Dear Mr. Sanford:

Counsel for the Press Enterprise Company hereby consents to the filing of an amicus curiae brief on behalf of a number of national press organizations.

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Re: Press Enterprise Company vs. Superior Court of the State of California for the County of Riverside

Dear Mr. Sanford:

As counsel for the Respondents in the above-referenced case, we consent to your filing of a brief of Amicus Curiae in this matter on behalf of a number of national press organizations. We understand that you will file this brief not later than April 9, 1983, in compliance with the extension of time granted to the Petitioner.

Very truly yours,

GERALD J. GEERLINGS
County Counsel

Joyce Manulis Reikes

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No. 82-556

Office - Supreme Court, U.S.
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CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, for the County of Riverside,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

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No. 82-556

In the Supreme Court

OF THE

United States

OCTOBER TERM 1982

PRESS-ENTERPRISE COMPANY, a California corporation,
Petitioner,

vs.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA, for the County of Riverside,
Respondent.

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE

Amici hereby respectfully submit the attached Brief of Amici Curiae in support of Petitioner. The written consent of the parties has been obtained pursuant to Rule 42 and is being filed concurrently with this brief which is filed within the time permitted to file Petitioner's Brief.

Amici are publishers of numerous newspapers in California which regularly provide the public with information about criminal trials and other aspects of the California criminal justice system, a voluntary trade association representing daily and weekly newspapers primarily in California, and a nonprofit organization representing educators and journalists from the print and broadcast media.

Although Petitioner has developed the issues relating to the specific constitutional errors in this case, additional analysis is necessary to demonstrate the statewide scope of the problem presented by closure of *voir dire*.

As the result of the California Supreme Court's decision in *Hovey v. Superior Court*, 28 Cal.3d 1, 168 Cal.Rptr. 128, 616 P.2d 1301 (1980), trial judges have been closing the *voir dire* phase of the trial in capital cases with alarming frequency.[1] The closed proceedings are of acute concern

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[1]Amici are aware of the following capital cases that have been tried after the *Hovey* decision in which some or all of the *voir dire* has been closed:

People v. Boyle, Riverside County, CR No. 18348.
People v. Rodriguez, San Mateo County, CR No. C-8773.
People v. Hawkins, Shasta County, CR No. 68841.
People v. Rich, Yolo County, CR No. 6629.
People v. Talamantez, San Diego County, CR No. 7556.
People v. Williams, San Diego County, CR No. 56218.
People v. Steed, San Diego County, CR No. 56218.
People v. Coleman, San Francisco, CR No. 101673.
People v. Hendrix, San Francisco, CR No. 105415.
People v. George Wayne Smith, et al., San Diego County, CR No. 6940.
People v. Alhert, Riverside County, CR No. 18348.
People v. Burgene, Riverside County, CR No. 18088.
People v. Corona, Alameda County, CR No. 68862.
People v. Gallego, Contra Costa County, CR No. 27054.

to Amici since such closures cause an immediate and irremediable loss of their First Amendment right to attend an important phase of the trial, thereby undermining the ability of the press to fulfill its responsibility to the public of reporting on these proceedings. In addition, an analysis of the public interests served by open *voir dire* proceedings in California will be helpful to the Court.

I

SUMMARY OF ARGUMENT

When the public is denied access to the *voir dire* of prospective jurors, it is excluded from one of the most critical phases of the trial. Indeed, the *voir dire* examination entails the selection of twelve citizens who are adjudged qualified to determine fairly and impartially the guilt or innocence of the defendant, and whether the defendant shall be sentenced to die. This process, with its exploration of juror attitudes, perceptions, prejudices and prior knowledge of the case, therefore is central to the public's understanding and acceptance of either the acquittal of the defendant or the imposition of the most severe and controversial of sanctions—the death penalty.

The need to ensure a public right of attendance during *voir dire* is even more compelling in light of the fact that no countervailing interest is served by denying access to this phase of the criminal trial.

People v. Harmer, et al., Riverside County, CR No. 17751.
People v. Bolin, Sacramento County, CR No. 62203.
People v. Bayles, et al., Sacramento County, CR No. 56044.
People v. Mozingo, Sacramento County, CR No. 57063.
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People v. Bean, Sacramento County, CR No. 58725.
People v. Armendariz, Sacramento County, CR No. 56607.
People v. Gallegos, Sacramento County, CR No. 60161.
People v. Webster, et al., Sacramento County, CR No. 62613.

II

THE HISTORY AND FUNCTION OF VOIR DIRE IN CALIFORNIA DEMONSTRATE THAT THIS PROCEDURE COMES WITHIN THE ESTABLISHED FIRST AMENDMENT RIGHT TO ATTEND CRIMINAL TRIALS

In *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980), seven justices of this Court recognized a constitutional right of the press and public to attend criminal trials. Both federal and state courts have expressly held that the *voir dire* examination of potential jurors is an integral part of the trial,[2] and, therefore, the question presented by this case has already been answered by the opinions in the *Richmond Newspapers* case. Moreover, an examination of the history and function of *voir dire* in California demonstrates that the jury selection process is central to the criminal justice system, and, accordingly, comes within the rationale developed in support of the right of access in *Richmond Newspapers.*

A. The History Of The Voir Dire Examination In California

The common law history of *voir dire,* which is developed in other briefs in this matter, demonstrates that the examination of jurors traditionally was conducted publicly both in England and the American colonies even before the drafting of the United States Constitution. When California achieved statehood in 1850, *voir dire* practice followed the common law. *People v. Crowe,* 8 Cal.3d 815, 821, n.1, 106 Cal.Rptr. 369, 506 P.2d 193 (1973).

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[2] *United States v. Brooklier,* 685 F.2d 1162, 1167 (9th Cir. 1982); *In re United States ex rel. Pulitzer Pub. Co.,* 635 F.2d 676 (8th Cir. 1980); *United States v. Woods,* 364 F.2d 481, 483 (3d Cir. 1966); *Commercial Printing Co. v. Lee,* 262 Ark. 87, 553 S.W.2d 270 (Ark. 1977); *Great Falls Tribune v. District Court, Etc.,* 608 P.2d 116, 120-121 (Mont. 1980).

Significantly, throughout its historical evolution, the California courts have recognized consistently that *voir dire* is part of the trial. *People v. Murphy,* 35 Cal.App.3d 905, 925-926, 111 Cal.Rptr. 295 (1973); *People v. Teitelbaum,* 163 Cal.App.2d 184, 206-207, 329 P.2d 157 (1958). Further, this evolution demonstrates that there is no special aspect of *voir dire* practice in this State that justifies any less stringent standards with respect to closure than for other phases of the trial.

The historical development of California *voir dire* practice following 1855 has been, in no small measure, a response to the creative efforts of attorneys to bend that process to their own adversarial needs. Prior to 1855, examination of a prospective juror was permitted only after interposition of a challenge for cause. *People v. Crowe, supra,* 8 Cal.3d at 821. After 1855, counsel were permitted the opportunity to examine prospective jurors to determine whether to interpose either a peremptory challenge or a challenge for cause. *People v. Backus,* 5 Cal. 275, 277 (1855). Once attorneys were given the right to participate, they began to recognize the importance of *voir dire* and to utilize it to their own advantage. *People v. Edwards,* 163 Cal. 752, 753, 127 P. 58 (1912).

In order to curb perceived abuses by attorneys seeking to precondition potential jurors to their clients' causes, the California courts and Legislature attempted periodically to limit the *voir dire* procedure. In 1912, for example, the California Supreme Court limited questioning to areas necessary to raise a challenge for cause. *People v. Edwards, supra,* 163 Cal. at 754-756.

In 1927, the Legislature sought to further limit questioning through amendment of California Penal Code Section 1078.[3] Subsequently, other legislative proposals have been

[3] In 1927 Section 1078 of the California Penal Code provided:

> It shall be the duty of the trial court to examine the prospective jurors to select a fair and impartial jury. He shall permit reasonable examination of prospective jurors by counsel for the people and for the defendant.

advanced to restrict the scope of *voir dire*, including unsuccessful efforts in 1971 and 1972. *People v. Crowe, supra*, 8 Cal.3d at 834, n. 1 (dissenting opinion).

In 1981, the permissible scope of *voir dire* examination was expanded in criminal cases to permit the parties to ask questions leading to the intelligent use of peremptory challenges. *People v. Williams*, 29 Cal.3d 392, 407, 174 Cal. Rptr. 317, 628 P.2d 869 (1981). In announcing this change, the California Supreme Court acknowledged that its decision did more to bring theory into accord with accepted practice in the state than to significantly change the scope of *voir dire* examination. *Id.*

After more than one hundred years of reform efforts, however, the California Supreme Court observed, somewhat cynically:

> The average trial manual bows in passing to the use of *voir dire* in obtaining a jury that is fair to both sides. Then it emphasizes that its greatest use is, in the words of the notorious Irish comic, Mr. Dooley, to get a jury that is 'more fair to wan side than the other.' Advice to the neophyte abounds in stratagems by which he may prejudice the jurors in favor of himself, his client and his case before the actual trial has started. Every field of human endeavor from psychiatry to animal magnetism and phrenology is to be used in observing the juror as the lengthy questioning proceeds. . . . *People v. Crowe, supra*, at 825, quoting Maxwell, *The Case of the Rebellious Juror* (1970) 56 A.B.A.J. 838, 841-842.

Not surprisingly, the Legislature, the courts and practitioners in California all continued to view *voir dire* as one of the most critical phases of the trial. Judge Julius M. Title, author of several articles on this subject, has written:

> . . . [P]ractically all experienced counsel in the criminal law field will agree that voir dire examination of jurors is generally the most vital phase of the trial

> of a criminal case. Such importance is suggested by the old time-worn adage that the trial of a cause is half over once the jury has been selected. Title, *Voir Dire Examination Of Jurors in Criminal Cases,* 43 Cal. State Bar J. 70, 71 (1968).

The historical development of *voir dire* in California as a procedure that is central to the criminal justice process underscores the legitimacy and importance of public access to this phase of the criminal trial.

B. The Function Of Voir Dire In California

In California, as elsewhere, the function of the *voir dire* in a criminal case is to permit the parties to select a jury of individuals who are qualified and competent to determine the facts of the case without bias, prejudice or partiality. *People v. Williams, supra,* 29 Cal.3d at 406.

Accordingly, the *voir dire* process is utilized in California to ensure a diversity of viewpoints among the jury, because it is believed such diversity helps to ensure neutrality. *Hovey v. Superior Court, supra,* 28 Cal.3d at 21-22. The object of this selection process is to obtain ". . . jurors [who] will inevitably belong to diverse and often overlapping groups defined by race, religion, ethnic or national origin, sex, age, education, occupation, economic condition, place of residence and political affiliation. . . ." *Id.* at 23.

Given this objective of diversity, it is not surprising that *voir dire* in California generally consists of questions on a broad range of subjects designed to determine the attitudes of potential jurors who must ultimately render an impartial judgment based upon the facts of the particular case.[4] Even before the California Supreme Court broad-

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[4]In the instant case, the comments of counsel reflected in the transcript filed as part of the Joint Appendix indicate that the trial judge found questions about the jurors' sexual experiences, marriage problems and their voting records relevant to their impartiality.

ened the permissible scope of juror questioning in *People v. Williams, supra,* 29 Cal.3d 392, it recognized that *voir dire* examination might well explore:

> . . . the exposure of prospective jurors to pretrial publicity, and their attitude towards proposed defenses (e.g., insanity, diminished capacity, self-defense, or alibi), potentially controversial circumstances of the case (e.g., the race of the participants, the use of alcohol or drugs, or the presence of sexual activity), or important rules of law bearing on the trial (e.g., the defendant's right not to testify, presumption of innocence, truth beyond a reasonable doubt, or jury unanimity). *Hovey v. Superior Court, supra,* 28 Cal.3d at 81, n. 137.

The California Supreme Court assumed that questions about these matters, which might be considered sensitive by some individuals, would be asked of prospective jurors in open court. *Id.* at 81.

Although both judge and counsel participate in the *voir dire* (*People v. Crowe, supra,* 8 Cal.3d at 821), the California Supreme Court has continued to recognize and endorse the need for ". . . the considerable discretion of the trial court to contain *voir dire* within reasonable limits." *People v. Williams, supra,* 29 Cal.3d at 408; *People v. Crowe,* 8 Cal.3d at 826-827. The trial court, therefore, retains the power to limit questions designed merely to seek tactical advantage (*People v. Adams,* 21 Cal.App.3d 972, 979, 99 Cal.Rptr. 122 (1971)), as well as to eliminate improper or repetitious questions. *People v. Crowe, supra,* 8 Cal.3d at 821; Title, *Voir Dire Examination of Jurors in Criminal Cases, supra,* 43 Cal. State Bar J. at 87.

With respect to capital cases, the California Legislature has provided that the same jury will determine issues of guilt and penalty during separate deliberations. Cal. Pen. Code § 190.1. Accordingly, certain procedural protections attach to the *voir dire* in capital cases to allow the exclu-

sion for cause of jurors who have certain disqualifying views on the death penalty. *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968); *People v. Lanphear,* 26 Cal.3d 814, 841, 163 Cal.Rptr. 601, 608 P.2d 689 (1980); *People v. Hovey, supra,* 28 Cal.3d 1.

In commenting on the need to carefully review *voir dire* procedures, the California Supreme Court explained:

> Given the frailty of human institutions and the enormity of the jury's decision to take or spare a life, trial courts must be especially vigilant to safeguard the neutrality, diversity and integrity of the jury to which society has entrusted the ultimate responsibility for life or death. *Hovey v. Superior Court, supra,* 28 Cal.3d at 81.

A procedure that is so essential to the dispensing of criminal justice should not be conducted behind closed doors. Public understanding and acceptance of the criminal justice system require that this aspect of the trial be conducted openly. Further, public attendance will enhance the functioning of the *voir dire* to ensure that the defendant ultimately obtains a trial by fair and impartial jurors.

III

PUBLIC POLICY CONSIDERATIONS UNDERLYING OPEN TRIALS FULLY APPLY IN THE CONTEXT OF VOIR DIRE

This Court has acknowledged repeatedly the importance of public review of the actions of all branches of government, including the criminal justice system. *Globe Newspaper Co. v. Superior Court,* ..... U.S. ....., 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982); *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 492, 95 S.Ct. 1029, 43 L.Ed.2d 328 (1975). *Nebraska Press Asso. v. Stuart,* 427 U.S. 539, 559-560, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Craig v. Harney,* 331 U.S. 367, 374, 67 S.Ct. 1249, 91 L.Ed. 1546 (1947).

California has made the same commitment. The Legislature has declared, ". . . access to information concerning the conduct of the people's business is a fundamental and necessary right for every person in this state." Cal. Gov. Code § 6250. The California courts, too, have recognized that the public has a legitimate and important interest in observing the functioning of judicial processes. *Briscoe v. Reader's Digest Association, Inc.*, 4 Cal.3d 529, 536, 93 Cal.Rptr. 866, 483 P.2d 34 (1971); *Brian W. v. Superior Court*, 20 Cal.3d 618, 626, 143 Cal.Rptr. 717, 574 P.2d 788 (1978).

This Court recognized that public access to criminal trials plays ". . . a particularly significant role in the functioning of the judicial process and the government as a whole." *Globe Newspaper Co. v. Superior Court, supra*, 73 L.Ed.2d at 256. In *Richmond Newspapers, Inc. v. Virginia, supra*, 448 U.S. at 569-571, four distinct benefits to the judicial process were identified which are derived from public attendance at trials;

1. Public scrutiny improved the quality of the trial;

2. Public access allowed for public understanding of the criminal justice system;

3. Public access fostered public confidence in the system; and

4. Public access contributed to a fuller community catharsis.

Each of these benefits of a public trial generally applies with at least equal force to the *voir dire*. Indeed, public access to the *voir dire* phase of the trial has a value particularly unique to that proceeding. As the Ninth Circuit Court of Appeals observed in *United States v. Brooklier, supra*, 685 F.2d at 1167:

> There can be no doubt of the importance of public scrutiny of the jury selection process to the effective functioning of the government as well as the judicial

> system itself. The meticulous care devoted to securing a fair and impartial jury exemplifies the search for even-handed justice characteristic of our system of criminal justice. Public access to the process will heighten public respect for that system. At the same time public scrutiny will encourage those who participate in the jury selection process to enhance the quality of the process and safeguard its integrity.

Thus, access to information about the jury selection procedure is essential to a public evaluation of one of the most important decision-making processes of government. As such, public access serves as an important check on the entire jury system and encourages public acceptance of the verdicts ultimately rendered. Because the jury's deliberation necessarily occur behind closed doors, public attendance during the *voir dire* phase is particularly important if there is to be any meaningful understanding of the jury system by the public.[5]

Also, access to *voir dire* furthers the public's ". . . fundamental, natural yearning to see justice done. . . ." (*Richmond Newspaper, supra,* 448 U.S. at 571) in the same manner that public access to other aspects of the criminal trial furthers that goal. If the criminal justice system is to fulfill the vital need for social retribution, then the process by which citizens are determined competent to render a verdict must be open to the public. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571.

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[5]Delayed dissemination of important information is not a substitute for the right to attend proceedings and trials. *Nebraska Press Asso. v. Stuart, supra,* 427 U.S. at 561. Therefore, the post-trial release of transcripts does not vindicate the First Amendment right of access. *Gannett Co. v. DePasquale,* 443 U.S. 368, 442 n.17, 99 S.Ct. 2898, 61 L.Ed.2d 608 (1979) (dissenting opinion of Justice Blackmun). In this case, the trial judge denied even this wholly inadequate substitute.

Furthermore, community catharsis cannot occur if the public is prevented from viewing the examination of those who determine guilt and penalty. The community must know who is responsible for these decisions, and how the responsible individuals are chosen.

The presence of the public also interjects an additional element of impartiality into the *voir dire* process that might otherwise be lost. Although, in theory, both prosecutor and defense counsel desire an impartial jury, in fact, each seeks a jury that will be sympathetic to their point of view. *See,* discussion ***ante*** at pp. 4-6. The public's interest, however, is in ensuring that the selection process produces a group of citizens who will reach a decision that fairly reflects the conscience of the community.

Access to *voir dire* is all the more important in a capital case because of the widespread public concern over the merits of the death penalty. When a defendant is found guilty of a capital offense, society invests twelve community members with the most awesome of responsibilities: the decision of whether that person will be sentenced to death.

Presently, many segments of the population in California are questioning whether the jury system is fully serving the ends of justice. In fact, widespread debate is occurring over the efficacy of the jury system in general, and *voir dire* in particular. Criminal defendants are claiming that the manner in which juries are selected for capital cases in California has prejudiced their fair trial rights.[6] Many similar challenges by defendants can be anticipated, since as of June, 1981, over 350 capital cases were pending in the California trial courts.

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[6]Hearings have been granted by the California Supreme Court in the following cases which challenge *voir dire*: *Word v. Superior Court*, S.F. 24376; *People v. Stankewitz*, (Crim. No. 20750); *People v. Hogan*, (Crim. No. 20943); *People v. Mroczko*, (Crim. No. 21159); *People v. Frank*, (Crim. No. 21353; *People v. Ainsworth*, (Crim. No. 21354); *People v. Holt*, (Crim. No. 21405); and *People v. L. Harris*, (Crim. No. 21633).

There is also widespread concern among the public that criminals are being improperly returned to society. Since "the people" have no appeal from an erroneous acquittal, however egregious, reform of the criminal justice system is the only safeguard available to the public. But the need for, or extent of, any reform is dependent on observing the system in operation. Further, the alternative—conducting critical portions of trials in secret—is certain to foster even greater public distrust of a system that is already under seige.[7]

Diminishing public confidence in the criminal justice system makes the need for public scrutiny of the *voir dire* all the more important.[8] Ultimately, public confidence must be founded upon a belief that the legal system is

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[7]Scholars and practitioners in the field have also joined the debate, further reflecting the widespread public interest in this issue:

Alvarez, Nancy Lewis, *Racial Bias and the Right to an Impartial Jury: A Standard For Allowing Voir Dire Inquiry*, 33 Hastings L.J. 959 (1982).

Epstein, Jeffrey M., *Criminal Procedure—Voir Dire—The California Supreme Court Permits Voir Dire to Be Conducted To Uncover a Basis for Peremptory Challenges*, 4 Whitt. L. Rev. 169 (1982).

Fieldscope Report: Attitudes Toward the Death Penalty Among The California Adult Public, Field Research Corp. of San Francisco for the National Council of Crime and Delinquency (March 1981).

Hunt, P.A., *Minimizing Racism in Jury Trials—Voir Dire Conducted by Garry, C.R. in People of California v. Newton, H.P.*, 65 Law Library Journal 110 (1972).

Millet, Craig H., Waine, Tina I., *Voir Dire Examinations*, 8 Pepperdine L. Rev. 504 (1981).

Moskitis, Richard L., *The Constitutional Need for Discovery of Pre-Voir Dire Juror Studies*, 49 So. Cal. L. Rev. 597 (1976).

Saltzman, Alan, *Jury Voir Dire Expanded*, 94 L.A. Daily J. 4 (July 16, 1981).

[8]*See*, Auerback and Kiernan, "Public Wants Court Reform, Poll Says," *The Washington Post*, March 19, 1978, page A2, discussing the Yankelovich study conducted in 1978 in which only 18 percent of individuals who were familiar with the legal system expressed confidence in the courts. Over 45 percent of the same group had little or no confidence in the legal system.

providing justice to the accused, the victim and society alike.[9]

The public has a right to know whether justice is being done. The lynchpin to that knowledge is an understanding of the qualifications of the twelve individuals who bring the collective judgment of the community into the courtroom. The public must be able to watch and hear, or observe through its media representatives, the procedures by which these twelve persons are adjudged to be competent and unbiased. Ultimately, public understanding and acceptance of our system of law is dependent on such knowledge.

IV

NO SUBSTANTIAL COUNTERVAILING INTEREST IS SERVED BY CLOSURE OF THE VOIR DIRE

In issuing the closure and sealing orders, the trial judge failed to articulate factual findings that would comport with the standards set forth in *Richmond Newspapers*. Nevertheless, the court's order of December 30, 1981, suggests that the trial judge was concerned with the Sixth Amendment rights of the defendant and the privacy rights of the jurors. Unfortunately, the judge misperceived the applicability of those rights in this case, and failed to properly consider what harm, if any, might occur if the *voir dire*

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[9]The public's need to understand and accept the proper function of its jury system is more than an abstract principle. For example, in the 1979 trial of Dan White for the murders of San Francisco's former mayor, George Moscone, and a former county supervisor, Harvey Milk, the jury acquitted White of murder and instead convicted him of manslaughter because of the defense of diminished capacity. The public could neither understand nor accept the jury's decision. As a consequence there was rioting in the streets and ultimately a legislative amendment to California's substantive criminal laws altering the diminished capacity defense. Calif. Pen. Code § 28, as amended by Stats. 1981, Chapt. 404; *see*, Gorney, "After the Riot: The Crisis In San Francisco," *The Washington Post*, May 30, 1979, page B2.

See also, San Francisco Chronicle, March 14, 1983, page 2, concerning public debate over jury verdict of not guilty for defendant on claim of self-defense.

were held in open court, or what less intrusive alternatives could mitigate that harm.

A. An Open Voir Dire Examination Will Not Impair The Defendant's Right To A Fair Trial

The traditional argument advanced to justify closure of courtroom proceedings is the perceived conflict between the Sixth and First Amendments, based on the claim that publicity about the events in court will ultimately prejudice the jury pool, thereby depriving the defendant of a fair trial. *Gannett Co. v. DePasquale, supra,* 443 U.S. at 378-387. In the case of *voir dire,* no such conflict exists.

Under California law, the *voir dire* of a prospective juror normally occurs in the presence of all of the other prospective jurors. *Hovey v. Superior Court, supra,* 28 Cal.3d at 81. Public and press attendance will therefore reveal no additional information to jurors that they have not already learned during the *voir dire* examination of their fellow jurors. The potential for harm from prejudicial publicity arising from public attendance at *voir dire* therefore is minimal.

In contrast, the benefit to the defendant resulting from open *voir dire* examination is great. Both federal and state decisions which specifically have reviewed *voir dire* proceedings in the context of a First Amendment claim by the media, have recognized that open examinations do not infringe upon Sixth Amendment rights. *United States v. Brooklier, supra,* 685 F.2d at 1166-1169; *In re United States ex rel. Pulitzer Pub. Co., supra,* 635 F.2d 676; *Great Falls Tribune v. District Court, Etc., supra,* 608 P.2d at 120-121; *Commercial Publishing Co. v. Lee, supra,* 553 S.W.2d 270.

Indeed, the safeguard provided to the defendant's fair trial rights by public attendance is even more important during *voir dire* than when the testimony of witnesses is being taken. The attorneys for the parties have a sub-

stantial opportunity to investigate the factual basis of the testimony of witnesses. In contrast, there is a comparatively limited ability to explore the backgrounds of potential jurors before commencement of the *voir dire* phase of trial. Thus, in the absence of public exposure, a juror who withholds or gives inaccurate information during *voir dire* is more likely to go undiscovered than the untruthful witness.[10]

An independent check on juror truthfulness is far more necessary than may be commonly perceived. In a study of juror behavior cited in *Hovey,* the empirical evidence indicated that in the hope of being chosen to sit on the panel, "[j]urors often, either consciously or unconsciously, lie on *voir dire.* . . ." Broeder, *Voir Dire Examinations: An Empirical Study* 38 So. Cal. L. Rev. 503, 528 (1965); *see also, People v. Williams, supra,* 29 Cal.3d at 402.

This Court, as well as other courts, has observed that public attendance generally improves both the quality and credibility of testimony. *Richmond Newspapers, Inc. v. Virginia, supra,* 448 U.S. at 569. *Globe Newspaper Co. v. Superior Court, supra,* 73 L.Ed.2d at 259, n. 26; *Brian W. v. Superior Court, supra,* 20 Cal.3d 618. The Ninth Circuit Court of Appeals has concluded that the quality of juror answers during the *voir dire* are similarly enhanced by public exposure. *United States v. Brooklier, supra,* 685 F.2d at 1169.

There is no reason to believe this phenomenon would be any less likely to occur during the questions concerning

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[10]The value of public scrutiny during the *voir dire* to a fair trial is illustrated by the case of *Los Angeles Coliseum Commission v. N.F.L.*, No. 78-3523-HP. In that case a member of the public came forward and identified a juror who had failed to disclose during *voir dire* a potential interest in the matter. As a result of news reports, the juror's nondisclosure came to light. This one juror was responsible for a hung jury, and caused the plaintiff to seek his removal. *See,* newspaper articles describing this matter in the appendices to the Petition for Reconsideration in *Oakland Alameda County, et al. v. United States District Court,* Ninth Circuit Court of Appeal Action No. 82-7070 filed on March 3, 1982.

the death penalty, and therefore the death-qualification of jurors presents no different analysis.

Certainly, the California Supreme Court did not intend that any portion of *voir dire* be conducted in secret when it adopted a procedural rule requiring that venire persons be questioned "individually and in sequestration" concerning their attitudes about the death penalty. *Hovey v. Superior Court, supra,* 28 Cal.3d at 80. On the contrary, the Court expressly stated that its decision would not ". . . in any way affect the open nature of a trial." *Id.* at 80-81.

The prejudice to the defendant's fair trial rights suggested in *Hovey* is unrelated to the presence or absence of the public. The *Hovey* court intended to minimize the untoward effects of death penalty questions on other potential jurors. *Id.* The *Brooklier* court also addressed the problem of undue influence on potential jurors as a result of their exposure to the responses of other jurors, concluding that prejudice could be avoided ". . . simply by keeping other potential jurors out of the courtroom while each was questioned." *United States v. Brooklier, supra,* 685 F.2d at 1169.

There is no serious practical impediment presented by allowing public attendance even while other prospective jurors are excluded. The trial judge can instruct the venire panel to avoid media reports of the *voir dire* proceedings if the judge concludes there is a substantial probability that exposure to such reports will cause irreparable harm to the defendant's ability to obtain a fair trial. And in those extremely rare cases where a compelling interest such as the physical safety of prospective jurors requires that their names not become public information, procedures can be devised to withhold the names while at the same time permitting the public to attend the *voir dire. See, e.g., United States v. Layton,* 519 F.Supp. 959 (N.D. Cal. 1981); *United States v. Barnes,* 604 F.2d 121 (2d Cir. 1979).

Hovey v. Superior Court, supra, does not alter this conclusion. Thus, the procedural rule adopted in *Hovey* may be applied in such fashion as to ameliorate any possible conflict between the Sixth Amendment and the First Amendment. Without guidance from this Court, however, trial judges in California will continue to rely on the *Hovey* decision to close *voir dire,* thereby avoiding their constitutional duty to accomodate the interests of both the defendant and the press. *Nebraska Press Asso. v. Stuart,* 427 U.S. 539, 561, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

The trial court's approach in this case compounded the constitutional error. By closing the *voir dire* simply on the authority of *Hovey v. Superior Court, supra,* 28 Cal.3d 1, the trial court here (like other trial courts in California) created a *per se* rule of closure without regard to the particular facts of the case before them. In adopting this approach, the trial judge attempted to do judicially what the State of Massachusetts did legislatively by enacting a statute which resulted in per se trial closures. This statute was declared unconstitutional in *Globe Newspaper* for this reason. Regardless of the branch of government from which such a *per se* closure rule emanates, the resulting wholesale denial of public attendance at criminal trials unconstitutionally infringes the right of access protected by the First Amendment.

B. There Is No Privacy Interest Of The Jury Justifying Closure

The trial judge in this case apparently concluded that a right of privacy could permanently shield from public scrutiny the process by which the jurors were chosen to sit in judgment of Albert Brown.[11]

Although this Court has viewed several aspects of an individual's privacy as deserving of protection,[12] not every privacy interest is protectable. *J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981). To date, no state or federal court has found a right of privacy protecting the disclosure of facts relevant to one's qualification to serve as a juror. Indeed, the Second Circuit Court of Appeals has considered the privacy interests of the jury and found that such a right of privacy did not apply to questions asked of jurors during *voir dire* ". . . insofar as their views might relate to the specific charges to be submitted to them." *United States v. Barnes, supra*, 604 F.2d at 135.

The court in *Barnes* accommodated the jurors' interest in safety because of the unique facts of that case by withholding juror names and addresses while still protecting the right of public access to the *voir dire*. The court disallowed unwarranted intrusions into the jurors' private thoughts and accordingly, limited the *voir dire* examination where

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[11]Petitioner cannot know what occurred in the closed courtroom without access to the sealed record; however, it must be assumed the questions asked during the closed proceedings ranged far beyond the death-qualification of the jurors. *Hovey* sanctions a limitation on the *voir dire* only as it relates to death-qualifications. Nevertheless, all but three days of the six-week *voir dire* proceedings were closed to the public in the instant case.

[12]*See e.g., Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. 469 [state tort of invasion of privacy]; *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), rehearing denied 410 U.S. 959, 93 S.Ct. 1409, 35 L.Ed.2d 694 [matters relating to marriage and procreation]; *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) [marital privacy]; *NAACP v. Alabama*, 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) [associational privacy]; *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932) [unreasonable governmental searches and seizures].

". . . the matter sought to be probed by the defendant was too remote from the issues in the case. . . ." *Id.* at 140.

These protective procedures made it unnecessary to deny the public's right to attend the *voir dire,* although the examination included questions about family history, previous dealings with government narcotic agents, previous criminal records of jurors and their family members, health problems and racial attitudes. *Id.* at 135-136. The court implicitly concluded that although certain aspects of individual privacy may be deserving of protection, there can be no privacy interest when the thoughts of a citizen called to serve on a jury are relevant to the individual's impartiality. *Id.* at 135. *Accord, Voir Dire Limitations As A Means Of Protecting Jurors' Safety and Privacy,* 93 Harv. L. Rev. 782, 792 (1980).

In California, limitations have been established on unnecessary intrusions into certain aspects of an individual's personal life based upon Article I, Section 1 of the California Constitution,[13] various State statutes (*e.g.,* California Government Code Section 6250), and the common law. *See, e.g., Forsher v. Bugliosi,* 26 Cal.3d 792, 163 Cal. Rptr. 628, 608 P.2d 716 (1980).

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[13]The amendment to the California Constitution was adopted in 1972, to provide protection to a specific privacy concern, *i.e.,* to prevent the encroachment upon personal freedom and security caused by increased surveillance and data collection activities. *People v. Privitera,* 23 Cal.3d 697, 709, 153 Cal.Rptr. 431, 591 P.2d 919 (1979). Since the adoption of this amendment, the courts have held that a number of different interests are entitled to constitutional protection, including protection against governmental surveillance of classroom discussions and data-gathering activities [*White v. Davis,* 13 Cal.3d 757, 774-775, 120 Cal.Rptr. 94, 533 P.2d 222 (1975)]; unauthorized dissemination of a student's records to a scholarship and loan agency [*Porten v. University of San Francisco,* 64 Cal.App.3d 825, 832, 134 Cal.Rptr. 839 (1976)]; disclosure of confidential bank records [*Valley Bank of Nevada v. Superior Court,* 15 Cal.3d 652, 656-657, 125 Cal.Rptr. 553, 542 P.2d 977 (1975)]; and, unwarranted discovery requests by litigants [*Richards v. Superior Court,* 86 Cal.App.3d 265, 272-273, 150 Cal. Rptr. 77 (1978).

The federal and California courts, however, have recognized that the right of privacy is circumscribed by rights protected under the First Amendment. In other words, protectable zones of privacy cannot intrude into areas of legitimate public concern. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. 469; *Forsher v. Bugliosi, supra,* 26 Cal.3d at 809. In the *Forsher* decision, the California Supreme Court found:

> In determining whether a cause of action has been stated, we must consider certain principles relating to the First Amendment, for the right to keep information private often clashes with the First Amendment right to disseminate information to the public. Warren and Brandeis [authors of *The Right of Privacy,* 4 Harv. L. Rev. 193 (1890)] themselves noted the potential conflict between freedom of the press and the right of privacy and suggested that the right should not apply to matters of 'public or general interest.' [Citations omitted.] (*Id.*)

The fact that a prospective juror does not serve voluntarily neither diminishes the public's interest, nor enhances the prospective juror's privacy claim. As this Court stated in *Time, Inc. v. Hill,* 385 U.S. 374, 388, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967):

> One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

Just as a subpeonaed witness cannot refuse on privacy grounds to give personal information when the information is relevant to the issues being tried, so too a juror cannot

avoid disclosure of personal information when the information is necessary to determine the juror's fitness to decide those issues. Public scrutiny is equally important in each instance.

Moreover, jurors are not troubled by public scrutiny of *voir dire*. One empirical study indicates that more than 90 percent of jurors questioned preferred that *voir dire* be conducted in open court. Broeder, *Voir Dire Examinations: An Empirical Study, supra,* 38 So.Cal.L.Rev. at 526. The study reported that the vast majority of jurors felt that "*voir dire* was not regarded as sufficiently embarrassing or upsetting to require so drastic a change [as closure]." *Id.*

This study belies any claim that potential jurors will be more forthright in disclosing bias behind closed doors. In those rare instances, when reluctance to disclose pertinent information is discovered, a potential juror may be challenged, but that is no basis for closure of the qualification process.

Even if the empirical evidence established that jurors preferred closed *voir dire,* there can be no reasonable or justifiable expectation of privacy concerning the jurors' thoughts and attitudes, so long as those thoughts relate to their competency or impartiality.

Once a citizen is called to serve on a jury and to assume the public responsibility of deciding the issues of guilt or innocence (and life or death in a capital case), that juror's qualifications are a matter of profound public concern. *Voir dire* is the phase of the trial when these qualifications are tested, and since what transpires in the courtrooms of this country is "public property" (*Craig v. Harney, supra,* 331 U.S. at 374), this inquiry may not constitutionally become the subject of a claim of privacy.

The trial court's third order permanently sealing the *voir dire* transcript *after* the trial concluded must have been based upon privacy interests since no Sixth Amend-

ment interest could be affected. In doing so, the trial court impermissibly crossed the boundary separating legitimately protectable privacy interests from the First Amendment right of access to information about criminal trials.

V

CONCLUSION

In every case, where a person is either convicted or acquitted and returned to society, important questions inevitably arise about the manner in which the jury is selected. Did the prosecutor unduly influence the jurors during their examination? Did the defense attorney adequately question prospective jurors to elicit prejudicial bias? Did the trial judge rule on challenges for cause in an evenhanded manner? Were the jurors candid and forthright in responding to *voir dire* questions? Were racial and sexual prejudices effectively eliminated? Such fundamental questions should not be permitted to fester in secrecy, but must be exposed to the cleansing light of public inquiry. Public confidence in the criminal justice system, as well as added protection for the rights of the accused, do not permit less.

Dated: April 8, 1983.

CROSBY, HEAFEY, ROACH & MAY
Professional Corporation
GRAY, CARY, AMES & FRYE

By JOHN E. CARNE
Counsel of Record for Amici Curiae

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No. 82-556-CSX
Status: GRANTED

Title: Press-Enterprise Company, Petitioner
v.
Superior Court of California, Riverside County

Docketed:
September 27, 1982

Court: Court of Appeal of California,
Fourth Appellate District

Counsel for petitioner: Ward, James D.

Counsel for respondent: Salter, Glenn Robert

Entry	Date	Note	Proceedings and Orders
1	Sep 27 1982	G	Petition for writ of certiorari filed.
2	Oct 12 1982		Petitioners letter in compliance with Rule 28.1 filed.
3	Nov 1 1982		Brief amicus curiae of CA Newspaper Publishers Assn. filed.
4	Nov 10 1982		DISTRIBUTED. November 24, 1982
5	Nov 17 1982	F	Response requested.
6	Dec 17 1982		Brief of respondent Super. Ct. of CA, in opposition filed.
7	Dec 22 1982		DISTRIBUTED. January 14, 1983
9	Jan 17 1983		REDISTRIBUTED. January 21, 1983
10	Jan 24 1983		Petition GRANTED.
			**********
12	Feb 16 1983		Order extending time to file brief of petitioner on the merits until April 9, 1983.
14	Feb 16 1983		Order extending time to file brief of respondent on the merits until June 8, 1983.
15	Apr 8 1983		Brief amicus curiae of State of California filed.
16	Apr 9 1983		Brief amicus curiae of Society of Professional Journalists, et al. filed.
17	Apr 11 1983		Brief amicus curiae of USA Today, et al. filed.
18	Apr 12 1983		Joint appendix filed.
19	Apr 12 1983		Brief of petitioner Press-Enterprise Co. filed.
20	Apr 25 1983	D	Motion of respondent for divided argument and for additional time for oral argument filed.
21	May 4 1983		Record filed.
22	May 16 1983		Motion of respondent for divided argument and for additional time for oral argument DENIED.
24	Jun 11 1983		Brief amicus curiae of Albert Greenwood Brown, Jr. filed.
25	Jun 8 1983		Brief of respondent Super. Ct. of CA, filed.
27	Apr 11 1983		Brief amicus curiae of CA State Public Defender filed.
28	Jul 8 1983		CIRCULATED.
29	Aug 15 1983		SET FOR ARGUMENT. Wednesday, October 12, 1983. (4th case)
30	Oct 5 1983	X	Reply brief of petitioner Press-Enterprise Co. filed.
31	Oct 12 1983		ARGUED.